THE RESPONSIBILITY OF SPAIN

FOR THE

Destruction of the United States Battleship Maine

IN HAVANA HARBOR, FEBRUARY 15, 1898,

AND THE

ASSUMPTION BY THE UNITED STATES, UNDER THE TREATY OF 1898, OF SPAIN'S PECUNIARY LIABILITY FOR THE INJURIES TO, AND DEATHS OF, HER OFFICERS AND CREW.

Argument

OF

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ON BEHALF OF CLAIMANTS REPRESENTED BY BUTLER & HARWOOD.

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STATEMENT.

The claims in both of these cases are for damages occasioned by the explosion of the *Maine* in Havana Harbor on February 15, 1898. The claimant McCann is a survivor and demands $10,000 as damages for injuries which he sustained; the claimant Burns demands $20,000 as damages for the death of her son, who was killed at the same time.*

In each case a petition has been filed in accordance with the provisions of the statute establishing the Commission, and with the rules and practice adopted by the Commission; each is properly verified, sets forth concisely and without unnecessary repetition the facts upon which the claims are based, together with the schedule setting forth the items claimed; each states the full name, residence and citizenship of the claimant and the amount of damages sought to be recovered; each has been signed and verified, and filed with the Clerk of the Commission under and pursuant to the statute, as well as the rules of this Commission; the prosecution, therefore, of each claim has not only been commenced, but has been properly commenced, and is properly before this Commis-

* About one hundred and thirty claims similar to those of these petitioners have been filed with the Spanish Treaty Claims Commissions. Most of them are claims of relatives of men who were killed, but a few are claims of survivors who were injured. About sixty of the petitioners are represented by Butler & Harwood, 135 Broadway, New York City, who are the attorneys for the petitioners McCann and Burns. The total amount of claims in what are known as *Maine* cases is about $2,500,000.

sion, and can only be prosecuted, or defended, in accordance with the provisions of the statute and the rules adopted by the Commission.

Briefly stated, each petition sets forth the following facts:

I.—That the petitioner is a citizen of the United States.

II.—That the petitioner has a claim against Spain which arose in the manner stated, and between February, 1895, and April, 1899—to wit, on February 15, 1898.

III.—That the claim has never been satisfied.

IV.—That the *Maine* at the time of the explosion was in the Harbor of Havana on a mission of peace, and rightfully there, and that the persons killed and injured were rightfully on board of her.

V.—That the injuries of the claimant, McCann, and the death of Burns, were the result of the explosion, and the claimants have actually sustained damages, as alleged, by reason thereof.

VI.—That such explosion was not the fault of the petitioner or of any person or persons in the employ, or under the control, of the United States, nor did it result from any interior cause whatever.

VII.—That such explosion and the resultant damages were caused by an exterior explosion; that the Government of Spain did not assure safety and security to the said battleship; that the explosion and resultant damages were directly caused by the wrongdoing and negligence of Spain and its officers and agents; and that the Government of Spain was and is responsible and liable therefor.

VIII.—That peace existed between Spain and the United States on February 15, 1898.

IX.—That Havana, Cuba, including the harbor thereof, on February 15, 1898, was under the control and dominion of the Government of Spain, and of no other country or government.

X.—That the political departments of the Government of the United States have established as an historical fact, which is binding upon the judicial department, that the Spanish Government was responsible for the destruction of the *Maine*.

On December 10, 1898, a treaty of peace was concluded between the United States and Spain; by Article VII. of this treaty each nation released the other from all claims, national and individual, to the most complete extent, and by the broadest terms, which could possibly have been used; and the United States also declared that it would adjudicate and settle the claims of its citizens which were thus relinquished.*

* "ARTICLE VII.—The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

"The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article" (30 U. S. St. at L., pp. 1754–1757.)

On March 2, 1901, Congress passed an act directing the President to appoint this Commission to adjudicate the claims relinquished by the article of the treaty.*

The act provides the method in which claims are to be presented and prosecuted and the procedure to be adopted by the United States. It also gives the Commission certain powers as to making its rules and conducting its business.

Pursuant to this statute, and this Commission being the only court clothed with any jurisdiction to receive, examine and adjudicate claims of this nature, the claimants have appeared at its bar to seek the redress to which they are entitled, and which they can obtain in no other manner.

Instead of answering or demurring to the petitions as required by the statute of March 2, 1901, the Attorney-General moved to dismiss the claims "for want of jurisdiction" of the Commission.†

To these motions the claimants raised the preliminary objection that under the statute of March 2, 1901, the defendant was confined to demurring or answering. The preliminary objections were argued on November 20th, and overruled, but on December 11th the motions were

* "CHAP. 800.—An Act to carry into effect the stipulations of article seven of the treaty between the United States and Spain concluded on the tenth day of December, eighteen hundred and ninety-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States shall appoint by and with the advice and consent of the Senate, five suitable persons learned in the law, who shall constitute a commission, whose duty it shall be, and it shall have jurisdiction, to receive, examine, and adjudicate all claims of citizens of the United States against Spain, which the United States agreed to adjudicate and settle by the seventh article of the treaty, concluded between the United States and Spain, on the tenth day of December, A.D. 1898. It shall adjudicate said claims according to the merit of the several cases, the principles of equity, and of international law" (31 U. S. St. at L., p. 877). The act consists of 16 sections, the first only is here quoted.

† The grounds stated in the motions to dismiss are as follows:

"1. That the alleged claim is not within the terms or the contemplation of the Treaty of Peace between the United States and the Kingdom of Spain of December 10, 1898, or of the Act of Congress of March 2, 1901, organizing this Commission; for that whatever may have been the facts out of which the alleged claim originated, such claim was extinguished at or before the execution of the Treaty of Peace, and the Act of Congress aforesaid, as appears by reference to protocol No. 20, of December 6, 1898. (Treaty of Peace between the United States and Spain, Senate, 55th Cong., 3rd session, Doc. No. 62, part 2, pp. 242–244.)

"2. That the alleged claim has been finally disposed of and concluded by the action of the political department of the United States, and this disposition and conclusion by the appropriate department of the Government bars the jurisdiction of this Commission or any other tribunal, in respect to the subject matter.

"3. That by the Act of Congress of March 30, 1898 (U. S. Stats. L., Vol. 30, p. 346) entitled 'An Act for the relief of the sufferers by the destruction of the United States S. S. *Maine* in the harbor of Havana, Cuba,' the United States has satisfied all claims for pecuniary indemnity sustained by individual citizens as a result of the acts alleged in the petition."

withdrawn and demurrers substituted therefor, the grounds for which were somewhat different than those stated in the motions to dismiss.*

In his brief on the preliminary objections the Attorney-General declared that the motions to dismiss *practically* were demurrers and could be considered and argued as such. On the argument of the objections, however, a different position was taken, and when a member of the Court asked why the motions were resorted to instead of demurrers, one of the counsel for the Government declared that the petition was drawn in such a manner that a demurrer was impractical. In fact, the learned counsel for the Government,† who has had great experience in international disputes, and has practiced extensively before tribunals of this nature, declared that "the petitions were marvelous examples of admirable pleading," and that it would probably be impossible to sustain demurrers thereto, owing to the allegations of fact which would necessarily have to be admitted on the argument.

After the Court had overruled the preliminary objections, the Attorney-General filed a brief on behalf of the Government in support of the motions to dismiss in which the position was taken: That "among the causes of war, formally set forth in the Joint Resolution of April 20, 1898, was the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit to Havana, * * * that it is a familiar principle of international law concerning war and treaties of peace, that the causes of war pass into oblivion, if not expressly saved therefrom by the treaty of peace. * * * That it is submitted that it was the intention of the treaty not to provide for, but to relinquish and leave in oblivion as settled in the tribunal of war, the grievance referred to expressly in the Joint Resolution of April 20, 1898"; his first point concludes with the following remarkable statement: "The destruction of Spanish lives and the loss of Spanish possessions atoned for and settled any supposed responsibility of Spain for the destruction of that national ship with its officers and crew." The brief then refers to the report of the Naval Court of Inquiry and to the Act of March 30, 1898, by which a sum not

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* The grounds of the demurrers are stated as follows:

Now comes the United States, by the Attorney-General, and demurs to the petition herein on the following grounds:

1. That the Commission has no jurisdiction of the subject matter stated in the petition.

2. That the petition does not contain facts sufficient to constitute a cause of action or entitle the claimant to an award against the defendant.

3. That no liability ever existed on the part of Spain in favor of the claimant by reason of the alleged acts complained of in the petition, and there is no liability on the part of the United States in favor of the claimant by reason of the Treaty of Peace between the United States and Spain of December 10, 1898.

4. That the alleged claim is not within the terms or the contemplation of the Treaty of Peace between the United States and the Kingdom of Spain of December 10, 1898, or the Act of Congress of March 2, 1901.

† Mr. Alexander Porter Morse.

greater than one year's sea pay was allowed to officers and seamen of the *Maine* for *articles* lost by reason of the destruction of the vessel, and the following conclusion deduced therefrom: "This action of the political department of the Government clearly demonstrates that a claim for money indemnity on behalf of individual citizens was never presented or intended to be presented against Spain, and that Article VII. of the treaty, therefore, was not intended to relinquish any claim on behalf of citizens against Spain."

Paragraphs III. and IV. of the brief are the most remarkable, however, in that they are practically a plea entered on behalf of the Spanish Government by the Attorney-General of the United States; they are therefore quoted in full in the notes for the purpose of showing that the Attorney-General has endeavored at every opportunity to make this Court believe that the adjudication clause of Article VII. of the treaty of 1898, was made for the benefit of Spain instead of for the benefit of citizens of the United States whose claims against Spain were obliterated by the treaty as against that country.*

The withdrawal of the motions and substitution of demurrers was another change of front on the part of the Government, and shows that it desires to avoid, if possible, any adjudication of these claims and that it intends to use every effort to prevent this Court from even considering them.

Before the argument on these demurrers the Attorney-General filed a consent that the brief above referred to should stand as his brief in support of the demurrers; since the argument the counsel for the Gov-

* "3. Notwithstanding the broad language of the treaty and the jurisdictional act, it is not to be supposed that the Government of Spain or the Congress of the United States intended that this commission, constituted in a spirit of reconciliation to ascertain in a familiar way the losses of American citizens 'that may have arisen since the beginning of the late insurrection in Cuba,' which was in February or March, 1895, should enter upon an inquiry into the responsibility of Spain for the destruction of the battleship referred to and bring in *ex parte* a judgment holding Spain up to the obloquy of the civilized world. That inquiry had been submitted to another tribunal, had been exhaustively carried on, had been acted upon by Congress, had been followed by war partially based upon the alleged destruction, and the subject had been carefully avoided in the treaty of reconciliation and peace.

"Spain had offered to submit to an impartial investigation by some third power, and had herself made an investigation, with the same indefinite result, it seems, as that made by the United States. To suppose that this commission, after all that has been referred to and with the means and appliances which have been furnished to it, suitable only for the ordinary purposes of a claims commission, was intended to open up and undo and do over again this inquiry into the responsibility of the Spanish Government, with the result of disgracing Spain on the one hand and on the other of discrediting the Government of the United States, is entirely unreasonable.

"4. If the commission shall be in doubt upon this subject, so obviously unthought of in the constituting of the commission, so far beyond its power to act upon adequately, and involving the sensibilities of a friendly power, its doubt should be resolved in favor of leaving to the political department of the Government a business which has already so long and seriously engaged its attention."

ernment have filed an additional brief in which their position is finally stated with some degree of definiteness; seven propositions are stated* at length, which are afterwards reduced to three principal points as follows:†

"I.—That the destruction of the battleship *Maine* was one of the causes of the war between Spain and the United States.‡

"II.—That no liability ever existed on the part of Spain in favor of the claimants by reason of the alleged acts complained of in the petitions.§

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* The seven propositions in the Government's brief are as follows:

"First.—That the Commission possesses no power or jurisdiction *to review* any act of the United States Government, whether enacted by its political, legislative or executive department within the scope of its constitutional function, unless there be clear and explicit authority to this effect appearing in the statute organizing the Commission.

"Second.—That no claim for indemnity, national or individual, except such as existed *against Spain* at the time of the execution of the treaty of peace can be entertained by the Commission.

"Third.—That no national claim for indemnity on account of the destruction of the *Maine was ever asserted by the United States against Spain*, and that no individual claim for indemnity arose out of this occurrence.

"Fourth.—That the battleship *Maine*, her crew and equipment, constituted an entirety, a unit, a military and governmental organism, which in its nature was not severable; and that, as a consequence, any claim for indemnity which may be conceived to have had any existence at any time was a purely national claim, and could only be affirmatively asserted and prosecuted as such by and on behalf of the State as claimant.

"Fifth.—That no individual claim for indemnity for the acts set out in the petitions existed against Spain, and there is not now nor can there be any individual claim for indemnity against the United States for said alleged acts by reason of the treaty of peace between the United States and Spain of December 10, 1898, or otherwise.

"Sixth.—That the averments in the petition and documents referred to and made parts thereof, and the history of events prior and subsequent to the destruction of the battleship *Maine* clearly shows that the destruction of said vessel was *at the time regarded as an act of war*.

"Seventh.—*That the subject matter*, namely, the destruction of the *Maine, and all its incidents*, was finally settled and disposed of before the creation of this Commission: *First*, by the action of the constituted authorities of the United States at Washington and at Paris; *Secondly*, by the provisions of the act of Congress of March 30, 1898; *Thirdly*, as a result of the treaty of peace between Spain and the United States of December 10, 1898."

† The propositions of the Attorney-General are all referred to and answered in the following argument, but as these points were prepared before the brief of the Government's counsel was filed, the order of discussion adopted herein is somewhat different from that adopted by the Attorney-General.

The Government has also printed and filed as a brief the argument of the counsel who closed the case on its behalf, and as that argument and the brief are constructed on different lines, it is impossible to answer them both consecutively.

‡ This point is answered in this argument under points sixth and seventh, pages 23 *et seq.*, *post*.

§ This point is answered as to the questions of exterritoriality under the Seventeenth Point, pp. 64 *et seq.*, *post*, and as to the right of sailors to recover indemnity under the Sixteenth Point, pp. 52 *et seq.*, *post*.

"III.—That the Commission has no jurisdiction of the subject-matter involved."*

The petitioners who have filed claims are sailors and marines, or the widows, orphans or mothers of sailors and marines of the United States Navy; they are citizens of the United States; they allege that they have, or had, claims against Spain which the United States has assumed; they have invoked the aid of this Court to obtain an "adjudication" thereof, and they submit that the claims are just and within the jurisdiction of this Court, whose duty as well as whose right it is to so adjudicate them; and they have every confidence that this Court will promptly and fearlessly adjudicate the just claims of American citizens, regardless of any consequences which may ensue, even to the extent, if it becomes unavoidable, of wounding the sensibilities of a foreign nation.

The demurrers should be overruled and in the absence of direct proof that Spain was not responsible, directly or indirectly, for the destruction of the *Maine*, judgment should be rendered for the petitioners to the full amount of their claims. In support of their position the following points are submitted on behalf of the petitioners.†

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* The jurisdiction of this Court to consider these claims is discussed under the first four points, pp. 8 *et seq., post.*

† This printed argument is mainly the substance of the subscribing counsel's oral argument before the Spanish Treaty Claims Commission on the demurrers at Washington, December 18th, 19th, 20th and 21st, 1901. It has been somewhat lengthened so as to reply to the brief and the argument filed by the Government.

The argument was heard by the full Commission, consisting of William E. Chandler, President, Gerrit E. Dickema, James Perry Wood, William L. Chambers and William A. Maury, Commissioners. Argument for the Government was made by Assistants Attorney General William E. Fuller and Chas. W. Russell, and Alexander Porter Morse, Charles F. Jones and Wm. E. Rogers, assistants; and for the claimants in the following order: Charles Henry Butler, of New York, and Clifford Walton, Benjamin Micou, W. W. Dudley and Hilary A. Herbert, of Washington, D. C. At the close of the argument an order was made permitting the Attorney-General to file a brief within one week and the claimants to file briefs within one week thereafter.

POINTS.

I.

AS TO JURISDICTION OF THE SPANISH TREATY-CLAIMS COMMISSION OVER THESE CLAIMS.

FIRST.—The jurisdiction of this Court is limited only to the extent that the claims which it can "receive, examine and adjudicate," must be those of citizens of the United States against Spain for injuries arising between February 25, 1895, and April 11, 1899, and which the United States agreed to assume and adjudicate by the Seventh Article of the Treaty of Paris.

The statute of March 2, 1901, not only expressly clothed this Court with jurisdiction over, but also made it the *duty* of the Commission to "receive, examine and adjudicate" all such claims of citizens of the United States of this nature. The petitioners have brought themselves within the letter and spirit of the statute, as well the evident intention of Congress, by alleging in their petitions all the facts necessary to bring their claims within the jurisdictional limitations.

If their allegations are true they have claims against Spain and this Court is bound to receive them, examine them, and adjudicate them in their favor; if their allegations are untrue the Court is equally bound to receive the claims, examine them, and adjudicate them against the claimants and in favor of the United States.

In fact, the Court already has *received* the claims, the Attorney-General is asking the Court to *examine* them, and if the claims should be dismissed for any cause it would necessarily be an *adjudication* by this Court.

The Attorney-General declares that it is beyond the power of this Court to adjudicate these claims, because it was contrary to the intention of the Peace Commissioners who made the treaty to assume these claims, and also because it was contrary to the intention of Congress in passing the statute creating this Court, to confer such jurisdiction upon it. There

is nothing either in the treaty, or in the statute, to indicate that such were the intentions of the makers of one, or of the enactors of the other. The terms used are general enough to include all claims which could in any way be advanced by citizens of the United States for claims which they allege are amongst those assumed by the United States by Article VII. of the treaty and which arose between the specified dates, and they are specific enough to exclude all those which do not come within those conditions. If the claims arose between the specified dates, and ever existed, *or if the petitioners allege that they so arose and existed*, and the petitioners are citizens, any decision of this Court that the claims have been discharged or obliterated by the treaty of peace must be made necessarily after reception, examination and adjudication, and therefore is within the jurisdiction of the Court.

The Attorney-General's position is inconsistent. On the one hand, he asks the Court to hold that it has no jurisdiction over these claims, and on the other, he asks it to adjudge that they have been obliterated by the treaty of peace. To sustain his position, he cites authorities on international law as to the effect of the treaty of peace, which are wholly inapplicable to these cases: they will be discussed under subsequent points on the *merits* of the demurrers. This and the three following points will be confined to the question of jurisdiction of this Court. In this respect the petitioners contend (**a**) they have alleged in their petition every fact necessary to confer jurisdiction and (**b**) that the question of Spain's responsibility being a question of fact cannot be raised on demurrer as it requires a direct denial of facts alleged in the petition to controvert it.

A. Every fact necessary to confer jurisdiction has been alleged in the petition.

The Spanish Treaty Claims Commission is a court of limited jurisdiction only in the sense that the suitors before it, and the controversies adjudicated by it, must be those referred to in the act of March 2, 1901.

Otherwise than this the jurisdiction of the Commission as a court is complete, and its power to examine and adjudicate the claims referred to it is even more extensive than the statutory and constitutional courts of this country, as it is not limited by the statute, or by the common, law; it is expressly provided that claims are to be received, examined and adjudicated according to their merits, and the principles of equity and of international law.

The Attorney-General, in the brief submitted by him on the preliminary objections raised by the claimants to his motions to dismiss these cases, has defined the jurisdiction of this Court, and while the claimants do not admit that his statement is in all respects correct, it will be admitted, for the purpose of this argument, so as to save discussion and

reduce it to the narrowest limits possible, as he has undoubtedly stated the rules as favorably as he possibly could for the Government.*

He must admit, of course, the converse of his own proposition, which must be accepted by this Commission as a statement that its jurisdiction is complete to receive, examine and adjudicate claims, whenever (1) the subject matter is an existing claim for indemnity against Spain, which has not been heretofore diplomatically, judicially or otherwise disposed of by competent authority and is not contractual in its nature, by claimants (2) who are citizens of the United States, and were so at the time of the acts complained of, which (3) occurred between February 25, 1895, and April 11, 1899, in (4) the island of Cuba.

The abstract of the petitions in the statement (*ante*, p. 2) shows that the claimants have brought themselves within every jurisdictional condition prescribed by the Attorney-General; the claimants are citizens of the United States; they were such at the time of the acts complained of, which took place in Havana, Cuba, on February 15, 1898, within the time specified in the treaty. As those allegations must, on the argument of these demurrers, be taken as true, they dispose of the second, third and fourth sub-divisions of the Attorney-General's statement as to jurisdiction. The jurisdiction of this Court over these claims is therefore admitted unless it appears from the petitions themselves that the subject matter is not "existing claims for indemnity against Spain which have not heretofore been diplomatically, judicially or otherwise disposed of by competent authority;" it is, of course, apparent from the petitions that the claims as against Spain are not contractual in their nature.

B. The question of the responsibility of Spain for the acts complained of cannot be raised on these demurrers as the petitions sufficiently allege negligence as a traversible fact, and a general

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* On page 1 of the brief referred to he says:

"The jurisdiction is special and limited in respect of (1) *subject-matter*, (2) *parties*, (3) *time*, and (4) *territory*.

"First. *The subject-matter:* The only claims which the Commission is authorized to 'receive, examine, and adjudicate' are claims for indemnity—existing claims for indemnity which were primarily against Spain, and which have not been heretofore diplomatically, judicially, or otherwise disposed of by competent authority. Contractual claims are not within its jurisdiction.

"Second. *The parties:* The parties must have been citizens of the United States at the time of the acts complained of.

"Third. *The time:* The time when the claims originated must be a period between the 25th day of February, 1895, and the 11th of April, 1899.

"Fourth. *The territory:* The territory in which the claims originated must be the island of Cuba.

"All these conditions must be fulfilled and must appear affirmatively *in the petition* before the Commission can entertain jurisdiction of the alleged claims." (Treaty of Paris, Article VII; act of March 2, 1901; Rules of the Commission.)

allegation, without stating the particulars showing the negligence, is sufficient as against a demurrer for insufficiency.

This is such an elementary principle of law that it is hardly necessary to cite any authorities; a few, however, are referred to.*

This point, however, is also disposed of by the statement of the Attorney-General, which appears in his brief on these demurrers, filed December 1st, that the destruction of the *Maine* was the cause of the recent war with Spain. The claimants do not admit that the destruction of the *Maine* was the cause of the war, but as the Attorney-General has so alleged it, he must be bound thereby, and it is not to be presumed that the cause of a war declared by the United States against another power was an act for which the foreign Government was not responsible. The fact that the political departments of the Government have declared that the abhorrent conditions in Cuba had culminated in the destruction of the *Maine*, eliminates the question of Spain's responsibility for the destruction of that vessel from these cases forever, no matter what the decision of the Court may be on these demurrers.

The single point, therefore, on which there can be any discussion as to jurisdiction of this Court to entertain these claims is as to the *subject matter* thereof. In that respect the petitions show that the claims are for damages occasioned by a tortious act committed by, or as the result of the negligence of, Spain; that allegation is sufficient in itself to confer not only jurisdiction upon, but also to make it the duty of, this Court to receive, examine and adjudicate these claims.

SECOND.—It is the duty of this Court to take jurisdiction of these claims and adjudicate them, as much for the benefit of the United States as for the claimants, and the intention of Congress that the Commission should exer-

**Harper* vs. *Norfolk & W. R. R. Co.*, 36 Fed. Rep., 102;
Mobile & M. R. Co. vs. *Crenshaw*, 65 Ala., 566,

and many other cases cited in Abbott's Trial Brief on the Pleadings, page 259. And a general allegation of negligence is equivalent to whatever degree of negligence is necessary to sustain the pleading,

Nolton vs. *Western R. R. Co.*, 15 N. Y., 444.
Rockford, &c., R. R. Co. vs. *Phillips*, 66 Ill., 551.

"The rule is well nigh universal that in an action for negligence the plaintiff need not set out in detail the specific acts constituting the negligence complained of, as this would be pleading the evidence. A general averment of negligence in the particular act complained of resulting in damages is good, at least as against a general demurrer."

Enc. of Pleading & Practice, vol. 14, pp. 333–4, citing numerous cases.

cise jurisdiction over all claims properly presented by verified petition is evidenced by the act itself.

The act of March 2, 1901, shows on its face that it was the intention of Congress to provide a court which should receive, examine and adjudicate the claims of all persons who should file petitions in accordance therewith, as the petitioners have done, alleging claims against Spain; it also shows that it was the intention of Congress that the Court should determine whether all claimants who should assert they had claims by filing verified petitions had or had not valid claims against Spain which had been assumed by the United States under the Treaty of 1898, and that the jurisdiction of the Court so created should be wide enough to enable it to receive, examine, adjudicate and finally dispose of every claim which should thus be brought before it. It must be remembered in this respect, that it is only by this Court's assuming jurisdiction and receiving, examining and adjudicating claims that the United States can be finally relieved, by the judgment of a court of competent jurisdiction, from liability for claims which do not exist. It would certainly defeat the purpose of Congress if this Court should decline to adjudicate claims brought before it for want of jurisdiction, as such disposal of claims presented would not be a determination which would relieve the United States of liability for such claims, and should thus leave them not only undetermined by this court, but undeterminable by any Court, as no other tribunal has any jurisdiction over them. It is, therefore, the duty of this Court to take jurisdiction of these claims; the proper method for the United States is to defend all claims for which, in the opinion of the Attorney-General, it is not liable, or which have been in some manner settled, either by answer or demurrer setting up the actual defenses in fact or in law thereto and thus, if successful, obtaining a final judgment **on the merits** of this Court to the effect that such claims are not meritorious and that the United States is not liable therefor. Such an adjudication would be beneficial to the United States, for it would actually be the judgment of a Court of competent jurisdiction: and would relieve Congress of all moral obligation to provide for such claimants. On the other hand a refusal to adjudicate on the ground that the Court does not possess the jurisdiction to do so, would throw back upon Congress the question of providing some other method of ascertaining the justice of the claims dismissed, notwithstanding the fact that this court exists for the very purpose of ascertaining what claims exist.

The benefits of the act must be mutual. The United States cannot obtain the benefit of the act and have the non-existence of claims determined without giving the claimants an equal opportunity of having a complete adjudication upon the merits of their claims.

THIRD.—Commissions and Courts similarly constituted, and possessing similar jurisdiction, have always considered their jurisdiction wide enough to embrace all claims arising out of, or in any way connected with, the matters referred to in the organic act or treaty.

The extent of the jurisdiction of tribunals of this nature has frequently been the subject of discussion, and the jurisdiction has always been sustained as being co-extensive with any claim which could *possibly* have been included in the general terms used.*

The construction of a treaty clause referring to **all claims** of citizens of the United States against a foreign government and limited only as to time of their inception, and the ownership thereof by citizens of the United States, was the subject of a decision by the Venezuela Claims Commission of 1889.

That such Commission did not unduly extend its own jurisdiction is evidenced by the dismissal of twelve claims, of which three were disallowed on motion of the claimants, four for want of jurisdiction and five without prejudice to their presentation elsewhere. The commission was composed of John Little, of Xenia, Ohio, for the United States, José Andrade for Venezuela, and at first Mr. Samuel F. Phillips as third Commissioner, agreed upon by the arbitrators, and after his resignation Mr. John V. L. Finlay, of Baltimore, Md., who was selected by the representatives of the two countries to succeed Mr. Phillips.

The Conventions of December 5, 1885, and March 15, 1888, provided for the settlement of claims between Venezuela and the United States, and by article II "all claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, which may have been presented to their Government or to its legation at Caracas, before the 1st day of August, 1868, and which by the terms of the aforesaid Convention of April 25, 1866, were proper to be presented to the mixed commission organized under said Convention shall be submitted to a new Commission."

To this commission there was presented the claim of W. H. Aspinwall & Co. for certain bonds of the Government of Venezuela, and the

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* "A court of limited jurisdiction is therefore not necessarily an inferior court in its technical sense, and it is said that those created by express constitutional enactments, with general and exclusive powers to hear and determine all controversies within their particular judicial sphere, cannot be said to be courts of limited or special jurisdiction within the meaning of the rule as to presumptions."

12 Encyc. of Pl. and Pr., 159–161, and see numerous cases cited in the notes, especially *Den* vs. *Hammel*, 18 N. J. L., 78.

question was raised as to whether or not the Commission had jurisdiction* of such a subject. A similar question had arisen under the Convention of 1857, between the United States and New Granada, in which it was held that bonds of New Granada were not claims within the terms of the Convention, and therefore not within the jurisdiction of that Commission.†

Mr. Little delivered the opinion for the Venezuela Commission in which a majority united, and it is therefore the official utterance of the Commission.‡ The thirty-five pages of opinions in this case read as though they were written expressly for the cases at bar.

The decision in the New Granada case is discussed sentence by sentence, and the fallacies upon which it was based exposed and refuted.

The definition of the word "claims" under municipal and international law, and the proper interpretation of the words "all claims which arose before a specified time," is discussed and authorities upon international law are cited as to their meaning and effect.§

On page 3631 the clause as it actually existed in the convention was placed in a parallel column with the clause as it would be interpreted by those who assailed the jurisdiction of the Commission, and the opinion says in regard to the two clauses: "It would be a bold declaration to assert their substantial sameness. Had it been the intention thus to limit the claims in *character*, it is difficult to understand why language to that end was not used as had been done before, as seen, and by the same parties, in convention with other powers." In fact, the opinion holds that where a convention used the words "all claims," which were held by citizens of the United States and which were limited in any way by time of their origin, that it made no difference whether the claims were contractual or tortious, but that their ownership as to citizenship and the time of their origin were the only questions which the Commissioners could consider and that they were bound to assume jurisdiction of all claims, regardless of their character.

The opinion refers to certain cases under the Mexican Commission of 1868, in which Sir Edward Thornton, as umpire, excluded certain cases from the consideration of that Commission, on the ground of their character,‖ but the distinction between these cases and the ones under present consideration is seen at once by an examination of the treaty.

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* This question is discussed here only from a jurisdictional point. It is again referred to as it affects the merits under the Eighteenth and Nineteenth Points, pp. 67 *et seq., post.*

† Moore's Arbitration, vol. 4, pp. 3616 *et seq.*

‡ Moore's Arbitration, vol. 4, pp. 3616–3642; Mr. Finlay concurred, *Id.*, 3642–3651.

§ Mr. Justice Story in *Prigg* vs. *Penna.* (16 Pet., 515); Lord Chief Justice Cockburn in *Queen* vs. *The Guardians* (9 L. Q. B., 395); Circuit Judge Deady in *Dowell* vs. *Cordwell* (4 Sawyer, 228); Chief Justice Marshall in *The Nereide* (9 Cr., 419), and many other authorities.

‖ Moore's Arbitration, vol. 4, p. 3628.

for the *character* of the claims referred by the Convention was expressly stated as those "arising from injuries to their persons or property," and it is evident from the language itself that claims arising *ex contractu* would not be embraced in that description.*

When the jurisdiction of the Mexican Claims Commission of 1839 was the subject of discussion and the question was raised whether it could take cognizance of certain cases, Mr. Webster's opinion, as the same is reported in Professor Moore's account of the proceedings of the Commission, was that the extent of jurisdiction must be determined by the Commission itself and could be exceedingly broad.†

* On page 3625, after citing *United States* vs. *Dickson* (15 Peters, 165) and *Minis* vs. *United States* (*Id.*, 445), Mr. Little uses the following words peculiarly applicable to the construction of the relinquishment and assumption clauses of Article VII. of the treaty of Paris, and the jurisdiction of this Court over all claims which were not affected by the limitations of time and citizenship:

"Almost in the language of the court it can be said: The office of the qualifying words relative to 'claims' in the treaty is to except demands from the general terms 'all claims' and to qualify and restrain their generality. And it would seem to be of little moment in what form those qualifying words were put, whether in that of a proviso or in that in which they stand. The principle of construction would be the same—that being that the qualifying words are, while the general terms of submission are not, to be taken in a restrictive sense, if there is to be any distinction.

"The comprehensive term 'claims' is the one always employed in similar claims treaties, though sometimes with a synonym—or as near that as the language affords—and is always accompanied with words of restriction. The restriction relates to ownership, time, origin, character, or circumstance, or to several of these. Under the convention between the United States and Ecuador (1864) ownership was the only qualification. It was competent to present any claim before the commission against either State, provided it belonged to a *citizen* of the other. In the treaty of 1834, between the United States and Spain, a single circumstance determined admissibility, to wit, that the claim had been 'preferred by either party against the other.' Usually several of the elements are embraced in the terms of qualification. The treaty of 1795, between the powers last mentioned, comprehended in them ownership, time, and character. The claims for adjustment there were for losses sustained by *citizens* of the United States in consequence of their vessels and cargoes having been *taken* by the subjects of His Catholic Majesty *during the late war* between Spain and France' In 1832 the United States and the two Sicilies treated for an indemnity to be paid by the latter to American merchants 'for losses inflicted upon them by Murat by the depredations, seizures, confiscations, and destruction of their vessels and cargoes in the years 1809, 1810, 1811, and 1812.' Here are the elements of ownership, time, origin, and character. All the five elements named are embraced in the qualifying terms of the '*Alabama* claims' treaty of 1871. It is unnecessary to particularize or to illustrate further. But attention may be directed still to two conventions under this head, that of 1802 between the United States and Spain, embracing the qualifying elements of time, ownership, and character, and that of 1864 between France and the Republic of Venezuela, comprehending the two latter only."

† 2 Moore's Int. Arbitration, pp. 1241, 1242:

"On several occasions, while the board was in session, Mr. Webster was appealed to in respect of some matter on which it had assumed to act. In all such cases he consistently maintained the position that it was an independent body, in whose proceedings it would be manifestly improper and unwarrantable for the Executive to intervene—a position eminently sound in law and wise in practice.

"November 12, 1841, the American commissioners inquired of Mr. Webster whether

The mixed Commission organized under Articles VI. and VII. of the treaty between the United States and Great Britain, divided on the question of jurisdiction, the American members, however, sustaining the jurisdiction of the Commission, Mr. Christopher Gore and Mr. Pinkney, both writing opinions.*

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certain claims had, as the Mexican commissioners contended, been withdrawn from the cognizance of the board. December 23, Mr. Webster in reply inclosed an extract from an instruction of Mr. Forsyth to Mr. Ellis, minister to Mexico, of May 3, 1839, and a copy of the note of the latter to the Mexican minister for foreign affairs of November 6, 1839, and stated that, as the execution of the convention was by the convention itself and the act of Congress confided exclusively to the commissioners, it was not considered to be the province of the Department of State to express an opinion on the point. The cases in question involved the acts of various Mexican officials, such as the seizure on the high seas of the American schooner *Topaz* and the killing of her captain and crew. In some of the cases the dismissal of an officer was demanded, in others a reprimand, and in others yet an infliction of punishment, and in at least one instance an assurance was asked for that no disrespect to the flag of the United States was intended. In bringing these several matters to the attention of the Mexican Government, Mr. Ellis had declared that they were 'not embraced in the convention signed * * * on the 11th of April last.' Under these circumstances the Mexican commissioners, on January 16, 1842, formally inquired of Mr. Webster whether the reservation made by Mr. Ellis 'positively excluded the personal interest' in the cases, and whether 'there only remain to be arranged between the two governments the subjects which relate to their flag, their honor, and their prerogatives.' Mr. Webster, on the 21st of January, answered that while it was not 'the province of the Executive of the United States to express an opinion upon the business which the convention has confided to the board of commissioners,' yet he would add, for the purpose of information, that 'if all claims of citizens of the United States involved in the case of the schooner *Topaz*, or in any other cases embraced by the first article of the convention, shall be considered and disposed of by the board according to the terms of the convention, it is certain that this government will not deem them a subject for any further negotiation with that of the Mexican republic.' 'The mixed commission under the convention with that republic,' said Mr. Webster, 'has always been considered by this government essentially a judicial tribunal, with independent attributes and powers in regard to its peculiar functions. Its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it.' On this statement the personal claims in question were held by the board to be within its jurisdiction, and were duly examined.

"The same position was maintained by Mr. Webster in other cases. On June 21, 1841, one of the claimants, named Santangelo, requested him to direct the diplomatic representative of the United States in Mexico to ask the government for certain papers which the commission had on an equal division refused to demand. Mr. Webster declined to grant the request, saying that the functions of the Department of State in relation to the claims were 'expressly limited by the convention to the transmission to the board of commissioners of such documents as the Department may receive.' Subsequently, when the request was renewed, he declared that the Executive of the United States had 'no right to interfere for the redress of our citizens who may suppose themselves to have been aggrieved by decisions of the commissioners under the convention with the Mexican republic. That body is, in effect, a judicial body, and it belongs to its members alone to determine the rights of claimants under the convention.'"

* Moore's International Arbitration, Vol. 3, pp. 2277 *et seq.*, Mr. Gore says: "When a complaint is brought before the Commissioners, the Board must take for granted that it

On the fourth day of the argument of the demurrers the President of the Commission asked the counsel of the claimants if they would "furnish reference to all cases in which a claim of an ambassador, foreign minister, soldier or sailor, for damages or injury received in the line of duty has been presented to any international or domestic tribunal authorized to adjudicate individual claims only."

The Attorney-General is attempting to divest this Court of jurisdiction over the claims of citizens because they wore the uniform of the United States. To counsel for the claimants it seems as though the question of the President of the Commission should have been directed not to the counsel for the claimants asking them to find cases in which jurisdiction has been taken, but the counsel for the Government should have been asked to furnish references in which jurisdiction had been declined on account of the relations of the claimants to the Government. Counsel for the Government has not furnished a single reference in which any tribunal or court, international or domestic, has refused to allow a claim on the ground that the claimant occupied a civil or military position under Government. While there have been a number of such cases, there have been many other cases in which the claim has been made by one Government against another and there has been no necessity of referring the matter to a tribunal, as it has been settled diplomatically by the offending Government acknowledging its liability and making proper reparation.* In such cases the claim has been regarded by both Governments as an individual claim, as the indemnity has been paid over directly to the individual sustaining the loss.

Some of the cases in which international tribunals and domestic commissions have adjudicated claims of this nature are those of: *Crew of the General Armstrong* against *Portugal*;† *Rice* against *Mexico*;‡ *Mc-*

is within their competency or refer it to some other tribunal to determine the question." Subsequently, when the English Commissioners withdrew, Mr. Gore filed an opinion in which he declared that "To refrain from acting when our duty calls us to act is as wrong as to act where we have not authority" (Moore, 2290).

* See cases of *Baltimore* (U. S. *vs.* Chili); *Chesapeake* (U. S. *vs.* Great Britain); *General Armstrong* (U. S. *vs.* Portugal); *Attaché Huesken* (U. S. *vs.* Japan); *Water Witch* (U. S. *vs.* Paraguay); *Sailors of the Corvette Duplieix* (France *vs.* Japan); *Col. Margery* (Great Britain *vs* China), and other cases cited under the Sixteenth Point, pp. 52 *et seq., post.*

† **The Crew of the General Armstrong.** This case is cited later under other points. It is referred to here only in answer to the Commissioner's question as an instance in which the individual claims of sailors on a privateer which was duly commissioned by the United States were submitted to arbitration. Although it was held by the arbitrator that the foreign country was not liable for indemnity, the question of jurisdiction was not raised and the United States itself presented to an international arbitration claims of its citizens, who as sailors on a commissioned privateer had actually received from the United States prize money for their gallant conduct in the battle of Fayal. The claim was advanced against the neutral nation for injuring men who at the time were fighting against a declared enemy of the United States.

‡ **Rice's case;** in which $4,000 was awarded by the Mexican Treaty of July 4, 1898, to a United States Consul for unlawful arrest, and from the opinion it would appear that it was exclusively for sixty hours' detention (4 Moore's Int. Arb., 3248).

Keown against *United States;** the *U. S. Consuls in Mexico* against *Mexico;*† *Ulrich* against *Mexico.*‡

These few cases are cited not because they are analogous as to facts or merits to the claims at bar, but simply to show that no doubt has ever been expressed as to the right of international or domestic tribunals to take jurisdiction of claims against foreign governments because the claimant held fiduciary or military positions under the Government, or that such fact in any way affected his claim if a similar claim would have been allowed to a citizen who did not represent his Government in any capacity whatever.

FOURTH.—The burden of sustaining a demurrer for want of jurisdiction in cases of this nature is upon the moving party, and all the presumptions are in favor of the petitioners.

This Commission is the only Court which has jurisdiction of claims of this nature, and if it should decline to take jurisdiction and sustain these demurrers the petitioners will be absolutely remediless and unable to prove their claims before any court; they would find themselves deprived of the remedy which Congress has given to all persons having claims against Spain, notwithstanding the fact that they have alleged their claims in the manner required by statute, and no fact stated in their petitions has been in any way controverted or denied.

The presumptions in cases of this nature must be in favor of the citizens whose claims have been taken for the public good, and whose only opportunity for compensation is to be found within this forum.

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* **McKeown's case;** a shipcarpenter in the service of the United States Government during the Civil War was arrested by his commanding officer and subsequently discharged after a confinement of thirteen days; he was a British subject, and after the war presented a claim to the mixed commission at Washington under the treaty of 18 1 and obtained an award for $1,467 against the United States (Moore's Int. Arb., 3211, and see other cases referred to in note on same page).

† **U. S. Consuls in Mexico.** Before war was declared between the United States and Mexico, consuls and vice-consuls of the United States were ordered to cease their functions. There were a number of American citizens expelled: consuls filed their claims before the Commission for damages by reason of this order, and the consuls' claims were held to be valid by the Commission of 1851 to adjudicate claims of its citizens against Mexico assumed by the United States under the treaty of 1848 (4 Moore's Int. Arb., 3336).

‡ **Ulrich's case** was a claim against the Mexican Minister, and was allowed by the Mexican Commission of 1851, which adjudicated claims against Mexico belonging to citizens of the United States assumed by the United States under the treaty of 1848 (4 Moore's Int. Arb., 3434).

The presumption must also exist that Congress did not intend to provide a tribunal of this nature, which should not have a jurisdiction extensive enough to cover all claims which would be presented to them.

To this extent the demurrer and motion to dismiss are practically the same, and subject to the same rules of pleading and practice.*

This Court was created solely to assist Congress in appropriating money to discharge the obligations assumed by the treaty of 1898. It was not necessary to have any Court. Congress could have referred all claims of every nature whatever to Committees of its own body, and no questions of jurisdiction could have arisen. Had Congress seen fit to do so, it could have appropriated the money to pay the claims without any adjudication by this Court or examination by any committee. It has, however, become the regular rule, and very properly so, for special courts to be created so as to relieve Congress from the necessity of investigating claims of this nature, which interfere with the legislative duties of its members, and also so that Congress may be assured of the justice and legality of the claims, and thus be enabled to appropriate money for the payment of all just claims, and not to be subjected to demands of petitioners for the payment of claims without foundation.

In fact, this Court simply acts as the conscience of Congress to guide it in making appropriations. Congress expressed by the enactment of the statute of March 2, 1901, the wish to be informed of *all claims assumed by the United States under Article VII. of the treaty*, and created this Court for that purpose. This Court cannot pay the claims which it adjudicates favorably to the claimant; Congress must appropriate the money therefor. Congress wishes to be as fully informed in regard to alleged claims which were not assumed by the United States as it does in regard to those which were assumed.

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* "A motion to terminate a suit against the will of the plaintiff can generally be made only by a party to the proceeding and the burden lies upon him to see that all the proceedings authorizing such a termination are substantially complied with."

6 Encycl. of Pleading and Practice, 875, under DISMISSAL.

"A motion to dismiss for lack of jurisdiction is appropriate only where the defect appears on the face of the record. More correct practice requires the objection to be taken by answer or demurrer, or by a rule to show cause."

6 Encycl. of Pleading and Practice, 887, under DISMISSAL.

The motion is to be determined on inspection of the bill only; the Court is not authorized to consider the answer and proof.

Id., p. 892, and numerous cases cited and notes on p. 876.

Bent vs. *Bent*, 43 Vermont, 44.

Bliss vs. *Smith*, 42 Vermont, 198.

Moore vs. *Helms*, 74 Ala., 368.

Jewell vs. *Lamoreaux*, 30 Mich., 136.

Holloway vs. *Freeman*, 22 Ill., 197, at p. 201.

"A bill is demurrable if want of jurisdiction *appears upon the face thereof*, otherwise a plea is proper."

Stephenson vs. *Davis*, 56 Maine, 75.

The presumptions must be that Congress having covered every class of claimants when it used the word **all**, it cannot be presumed that in creating this Court and giving it jurisdiction, and also making it its duty, to "receive, examine and adjudicate all claims," it expressly excepted a single class of claimants whose claims are of the most important character, and are certainly the most entitled to the consideration of national sympathy and national indemnity of all the claims presented to this Commission.*

II.

AS TO THE MERITS OF THE DEMURRERS.

FIFTH.—The claims of the petitioners should be allowed by this Court "on their merits and on the principles of equity and of international law."

The argument thus far has referred only to questions of jurisdiction. Assuming that the Court will take jurisdiction, even if motions were properly before the Court in those respects, the demurrers should be overruled on the merits.

When, on March 2, 1901, Congress created this Court, it well knew that according to the strict rules of the common law and of statutory construction, claims might be presented to it for adjudication which could not be allowed unless the Court found that the United States was bound in good conscience to indemnify the claimants for claims in accordance with precedents of international law and conduct between nations under similar conditions, and it accordingly clothed the Court with jurisdiction to adjudicate the claims according to their merits and the principles of equity and of international law.

1. There can be no doubt as to the **merits** of the claims, as upon the demurrers it is necessarily admitted that the claimants are citizens; that they sustained the damage complained of; and that such damages were caused by the negligence or wrongdoing of the Spanish Government; the question of amount is, of course, not now before the Court.

2. The claimants are entitled on **"the principles of equity"** to recover from the United States whatever the United States could have demanded on their behalf from Spain at the time that the treaty was made. The claimants were not present. The Commissioners appointed by the United States to negotiate the treaty, however, represented them, and it is not to be presumed that Commissioners appointed by the President to arrange terms of peace with a conquered foe would either

* The first section of the Act of March 2, 1901, creating this Court, is quoted on page 3 of this brief, *ante*.

forget to include or intentionally omit any claims which could have been presented had there been no war, and the negotiations related not to a treaty of peace but solely to the settlement of claims.

Peace is the highest object sought in the conclusion of treaties, and, therefore, the rights of individuals must give way for the sake of national peace; but the Government, in making peace for the good of the nation, must not and will not, forget the individual rights of its citizens. Congress unquestionably intended, in especially including the principles of equity as a basis for the adjudication of these claims, that the claimants should have the benefit of every presumption to which they could possibly be entitled, and which under stricter rules of law they might not be able to invoke.

3. On **"the principles of international law,"** the United States could have demanded indemnity for these claimants from Spain; and this Court must allow such as are similar to those which have heretofore been made the basis of international demands and payments, as such precedents are the only guides for their decisions.

It was argued by counsel for the Government, and is also stated in their brief, that the precedents cited by claimants are not binding upon this Court. But this cannot be sustained, for it has frequently been decided by the Supreme Court of the United States that international law has always been recognized as a part of the law of the United States; that it is for the Court to determine what principles and rules have actually become incorporated into our law, and which of them are applicable to the case before it; and not only must decisions of our own Courts be followed, but decisions of courts of other countries and the actions of this and other Governments under similar circumstances must be taken as guides and precedents; that in the absence of any treaty stipulation, statute or accepted provision of law, it is the duty of the Courts to follow such precedents as by direct application, or by analogy, can guide the Court to a correct decision.*

Counsel for the Government in their arguments and briefs maintain that the demand for indemnity on behalf of a sailor when killed or ill treated in a foreign country has been purely a national matter, and one

* In the *Paquette Habana*, U. S. Sup. Ct., 1900, 175 U. S., 677, GRAY, *J.*, says (p. 700): "For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who, by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."

See, also, as to international law being a part of the law of the land,

Hilton vs. *Guiyot*, U. S. Sup. Ct., 1895, 159 U. S., 113, GRAY, *J.*
Fremont vs. *United States*, U. S. Sup. Ct., 17 Howard, 542, 547.
The Scotia, U. S. Sup. Ct., 14 Wallace, 170, 188.
Respublica vs. *DeLongchamp*, Sup Ct., Penna., 1 Dallas, 111, 116.
Moultrie vs. *Hunt*, N. Y. Court of Appeals, 23 N. Y., 394, 396.

which the Government would or would not make according to its own inclination, and that the fact that demands have been made and collected does not necessarily oblige this Court to hold that the Government was obliged to make such claims on behalf of those who suffered by the *Maine*, and that if such obligation did not exist against this Government to make the demand on Spain, no obligation now exists against it to pay the claim after Spain has been released therefrom.

If this proposition is correct it practically relieves this Court of its jurisdiction over nearly every other claim which has been filed; the same rule would equally apply to all claims of whatsoever nature, for formal demand had not been made prior to the declaration of war. Claims of citizens of one country against the Government of another are, as to certain features, always national, and it is also optional with a Government, to a certain extent, to determine whether it will, or will not, assert the claim. It is sometimes inadvisable to do so for political reasons; sometimes the weakness of the State whose citizens have suffered injury prevents their claims from being asserted with the vigor necessary to enforce them. The question in these cases, however, for this Court to determine, is what the Government **could have done** in regard to these claims when the Treaty of Paris was negotiated. The Government cannot now ask this Court to relieve it from any claim or class of claims by asserting that it failed to present the claims properly or that possibly it might under certain circumstances have declined to present them.

If this Court finds that on any previous occasions, be they few or many, the United States demanded and collected indemnity from foreign nations for claims similar to those here presented, which it has paid over to individuals similarly situated to these claimants, then it is bound under the statute which requires it to adjudicate these cases on principles of equity and of international law, to make their award in favor of the claimants.

That the United States has made such demands, collected such indemnity, and so applied the amount is beyond question. See cases of the *Baltimore*, *Wyoming*, *Water Witch*, *Virginius*, *General Armstrong*, *Attaché Hueskin*, and other cases cited under other points.*

Counsel for the Government in their brief advance the proposition that in the *Baltimore*, *Water Witch* and other cases the Government of its own motion demanded the indemnity and was not requested to do so by the sufferers themselves, and claimed that for this reason it cannot be asserted that a claim existed. In fact, they practically claim that because on some occasions the United States has voluntarily asserted claims of this nature that other persons who were entitled thereto cannot as a matter of right assert claims which have similarly arisen. Certainly a proposition of that nature does not need any argument to review it. The fact, however, as stated in another point,† that the United States formally, through the President, Secretary of State

* See Sixteenth Point, pp 52 *et seq.*, *post.*

† See Nineteenth Point, pp. 75 *et seq.*, *post.*

and Minister Woodford, asserted to Spain that it would expect Spain to make such reparation as one civilized nation should make to another, and this statement relieved the claimants themselves from any necessity whatever of presenting these claims to Spain or asking their Government to take them up.*

SIXTH.—The Attorney-General's proposition that the destruction of the Maine was the cause of the war is correct only so far as it places the responsibility of that act on Spain, otherwise it is untenable.

The Attorney-General based the motions to dismiss chiefly upon a proposition which he still adheres to as the basis for the demurrers, and which consists of four elements, two of which are distinct statements of fact and two of which are conclusions of law, as follows: (1) Spain was responsible for the destruction of the *Maine;* (2) such destruction was the cause of the war; (3) the treaty of peace obliterated all claims for matters causing the war and therefore claims arising from the destruction of the *Maine* "passed into oblivion" and were not amongst the claims of its citizens against Spain which the United States assumed by Article VII. of the Treaty of 1898; (4) that such obliteration of the claims of the United States and its citizens relieved the United States from compensating its own citizens whose claims were thus obliterated and sacrificed for the public good.

No matter how he may try to avoid stating both of the above facts, they are necessarily asserted by the Attorney-General as component parts of his proposition, as it cannot under any circumstances be assumed that war was declared by the United States against Spain for the destruction of the *Maine* unless Spain was actually as a matter of fact responsible therefor.

It is needless to say that the claimants not only admit, for they assert, Spain's responsibility for the destruction of the *Maine;* they do not, however, admit the other assertion that the destruction of the *Maine* was the cause of the war, or the conclusion attempted to be deduced therefrom that claims connected therewith passed into oblivion as between the United States and its own citizens.

* In the case of *Panama Riots* where the United States referred to the cases *en bloc* and the umpire to whom was submitted the question as to whether claims could be considered as having been presented under such circumstances held that where there are many sufferers arising from a single cause and the Government refers to them as a class, that it was a sufficient presentation to bring them within the terms of the treaty, and under the jurisdiction of a Commission appointed to adjudicate claims which had been previously presented. (2 Moore on Arbitration, p. 1375.)

The claimants having asserted in their verified petitions that Spain was responsible for the destruction of the *Maine*, and the Attorney-General having also set it up as the basis of these motions by asserting that it was the cause of the war, there can be no question that these claims are within the jurisdiction of this Court unless they were obliterated by the treaty of peace and not assumed by the United States.

The position taken by all the counsel for the claimants in regard to the destruction of the *Maine* has been consistent throughout, and is distinctly stated under the next point. The various positions taken by the counsel for the Government has been so inconsistent with each other and with the facts that it is proper to call the attention of the Court thereto.

In the opening argument the Government took the position that the destruction of the *Maine* was the cause of the war, and on more than one occasion during the argument the expression "atrocious act," or its equivalent, was used by counsel for the Government; in another argument on behalf of the Government the statement was made that the destruction of the *Maine* was **an act of war;** during the closing argument there was open discussion in the court-room between two of the Government's counsel as to whether it was an act of war or merely one of the causes of the war, the result of which was the withdrawal of the "act of war" theory and adherence to the "cause of war" theory.

Ordinarily upon argument of a demurrer the statements contained in the petition are taken as true, without in any way rendering the demurring party liable to charges of inconsistency for subsequently denying allegations which are thus admitted only for argument. In this case, however, the Attorney-General was confronted with the position that he could not sustain his demurrer without going outside of the record and so instead of relying upon the allegations in the petitions, he **alleged extrinsic facts** to prove that Spain actually destroyed the *Maine*, and thereby caused the subsequent war. This position he evidently considerered necessary so as to nentralize the effect of admitting Spain's wrongful act, as alleged in the petitions.

While this position was finally taken on the argument, the Attorney-General has foreseen that if these demurrers should be overruled he could not subsequently answer denying the allegation that the *Maine* was destroyed by the Spanish Government without laying himself open to further charges of inconsistency. The Government's brief, therefore, endeavors to qualify the implied admissions by charging the American people with having declared war against Spain, not because it blew up the *Maine*, but because the American people *believed* that Spain was responsible therefor; it actually goes so far as to declare that such belief was as potent a factor in a declaration of war as though it had been actually proved that Spain was responsible for such destruction.

It is a more serious matter, however, than the Attorney-General thinks to charge the American people, the Congress of the United

States and President McKinley with having declared war, not upon ascertained facts and for existing causes, but upon the mere belief that a criminal act had been committed, which, if true, would justify, not war, but demand for the indemnity which had been offered if the responsibility were proved.*

SEVENTH.—It is not an historical fact that the destruction of the Maine was the cause of the war; this appears from the legislative history of the declaration of war with Spain, and on demurrer no facts can be asserted except such as are within the judicial knowledge of the Court; the action of the executive and political departments of the Government clearly indicates that the war of 1898 with Spain was not declared on account of the destruction of the Maine.

The position of the claimants in regard to the destruction of the *Maine* and its relations to the war which subsequently followed between the United States and Spain has never varied and, notwithstanding any statement of the Attorney-General to the contrary, is consistent with all other propositions advanced by them. They contend that the act resulted either from criminal negligence or by actual direction of the Spanish Government during a time of peace and was in direct violation of treaty stipulations; that it added a culminating factor to the abhorrent conditions which existed in Cuba and justified the United States in demanding that Spain withdraw her sovereignty therefrom, and that had Spain recognized in advance the hopelessness of a contest with the United States and withdrawn from Cuba, the claims for destruction of the *Maine*, both national and individual, would have been presented and pressed for payment in the same manner as other existing claims would have been presented and pressed. That the war resulted from Spain's refusal to withdraw from Cuba and a practical declaration of war on her part

* On page 4 of the Government's brief it is said: "We do not intimate that the destruction of the *Maine* was caused directly or indirectly by the act or negligence of Spain; but one thing we do affirm as a matter of fact of history, that at the time the almost universal belief of the American people was that the Queen of Spain was responsible for that dreadful catastrophe. This belief was shared by Congress, as appears from the various resolutions that were introduced and of the joint resolution approved on April 20, 1898. The fact that the people, Congress and the President *believed* at the time that Spain was responsible was just as potent a factor in causing the war under the existing circumstances as though that responsibility had been fixed upon Spain." The Attorney-General seems to have lost sight of the fact that *on these demurrers* Spain's liability is necessarily admitted.

against the United States is clearly demonstrated by the legislative history of the declaration of war, as it appears from the *Congressional Record*, the messages of the President of the United States, and the correspondence between the United States and the Spanish Government through the regular diplomatic channels.

The destruction of the *Maine* occurred on February 15, 1898. Long prior thereto the President of the United States had called attention to the conditions existing in Cuba and had declared that if they were not ameliorated by the Spanish Government it would be necessary for the United States to intervene and protect its interests in that island.*

Immediately after the destruction of the *Maine* a Naval Court of Inquiry was appointed pursuant to statute, which, on March 21st, reached the conclusion that the destruction of the *Maine* was not due to negligence on the part of the officers or crew, but was caused by the explosion of a submarine mine, but no evidence had been obtainable fixing the blame; on March 28th, said report, together with the testimony, was transmitted by the President of the United States to Congress.†

On April 11, 1898, the President of the United States transmitted a message to Congress on the relations of the United States to Spain by reason of the warfare in the island of Cuba, in which message he referred to the revolution in Cuba, which he declared had begun in February, 1895, and had reduced Cuba to want, paralyzed its commerce and seriously involved the commercial and political interests of the United States.‡

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* See First Annual Message of President McKinley, transmitted to Congress December 6, 1897, Richardson's Messages, Vol. X., pp. 127 *et seq.*

† "The conclusions of the Court are:

That the loss of the *Maine* was not in any respect due to negligence on the part of any of the officers or members of her crew;

That the ship was destroyed by the explosion of a submarine mine, which caused the partial explosion of two or more of her forward magazines; and

That no evidence has been obtainable fixing the responsibility for the destruction of the *Maine* upon any person or persons.

I have therefore directed the finding of the Court of Inquiry and the views of this Government thereon be communicated to the Government of Her Majesty the Queen Regent, and I do not permit myself to doubt that the sense of justice of the Spanish nation will dictate a course of action suggested by honor and the friendly relations of the two Governments.

It will be the duty of the Executive to advise Congress of the result, and in the meantime deliberate consideration is invoked."

(Senate Document No. 207, 55th Congress, 2nd Session, March 28th, 1898.

‡ "The forcible intervention of the United States as a neutral to stop the war according to the large dictates of humanity and following many historical precedents where neighboring States had interfered to check the hopeless sacrifices of life by internecine conflicts beyond their borders is justifiable on rational grounds. It involves, however, hostile constraint upon both the parties to the contest as well to enforce a truce as to guide the eventual settlement.

"These elements of danger and disorder already pointed out have been strikingly illustrated by a tragic event which has deeply and justly moved the American people. I

He then summarized the grounds for intervention, first, in the cause of humanity; second, that we owed it to our citizens in Cuba to afford them protection and indemnity for life and property which no Government there can or will afford; third, to prevent injury to the commerce, trade and business of our own people, and, fourth, which he declared to be of the utmost importance, to relieve t is Government from the enormous expense which the warfare in Cuba had entailed upon it to preserve neutrality.

The destruction of the *Maine* is alluded to as evidence of the existing elements of danger and disorder which justified the intervention of the United States in terminating the warfare.

On the same day the President of the United States, in another message to Congress, transmitted Consular correspondence respecting the condition of the reconcentrados in Cuba, the state of war in that island and the prospect of the projected autonomy.*

The foregoing messages as well as many other communications relating to the warfare in Cuba were referred to the Committee on Foreign Relations in the Senate, and to the Committee on Foreign Affairs in the House of Representatives.

On April 13th, 1898, the Committee on Foreign Relations of the United States submitted a report relative to affairs in Cuba,† in which it

have already transmitted to Congress the report of the naval court of inquiry on the destruction of the battleship *Maine* in the harbor of Havana during the night of the 15th of February. The destruction of that noble vessel has filled the national heart with inexpressible horror. Two hundred and fifty-eight brave sailors and marines and two officers of our Navy, reposing in the fancied security of a friendly harbor, have been hurled to death, grief and want brought to their homes, and sorrow to the nation.

"The naval court of inquiry, which, it is needless to say, commands the unqualified confidence of the Government, was unanimous in its conclusion that the destruction of the *Maine* was caused by an exterior explosion, that of a submarine mine. It did not assume to place the responsibility. That remains to be fixed.

"In any event the destruction of the *Maine* by whatever exterior cause, is a patent and impressive proof of a state of things in Cuba that is intolerable. That condition is thus shown to be such that the Spanish Government cannot assure safety and security to a vessel of the American Navy in the harbor of Havana on a mission of peace, and rightfully there.

"Further referring in this connection to recent diplomatic correspondence, a despatch from our Minister to Spain, of the 26th ultimo, contained the statement that the Spanish Minister for Foreign Affairs assured him positively that Spain will do all that the highest honor and justice require in the matter of the *Maine*. The reply above referred to of the 31st ultimo also contained an expression of the readiness of Spain to submit to an arbitration all the differences which can arise in this matter, which is subsequently explained by the note of the Spanish Minister at Washington of the 10th instant, as follows:

"'As to the question of fact which springs from the diversity of views between the reports of the American and Spanish boards, Spain proposes that the facts be ascertained by an impartial investigation by experts, whose decision Spain accepts in advance.'

"To this I have made no reply" (H. R., Document No. 405, 55th Congress, 2d Session, April 11th, 1898).

* Senate Document No. 230, 55th Congress, 2d Session, April 11th, 1898.

† Senate Report No. 885, 55th Congress, 2d Session, April 13th, 1898.

reviewed the political history of Cuba during the preceding three years and referred to many acts of atrocity on the part of the Spanish Government. That report declares that the destruction of the *Maine* was only a single incident in the relations of this Government with Spain, and that "if that calamity had never happened the questions between the United States and that Government would press for immediate solution": that the unfortunate condition of Cuba and the continuance of the insurrection in that island was due to Spanish misrule; that such Government had violated the laws of civilized warfare in the conduct of her military operations, slaughtered prisoners after their surrender, massacred the sick and wounded insurgent soldiers and their physicians and nurses in their captured hospitals; it declared the United States "cannot consent upon any conditions that the depopulated portions of Cuba shall be re-colonized by Spain any more than she should be allowed to found a new colony in any other part of this hemisphere, or island thereof. Either act is regarded by the United States as dangerous to our peace and safety." The report states that Spain had failed to perform her treaty obligations and other international duties toward the United States; that it was impossible to minutely specify these derelictions, but that American citizens had been seized and imprisoned without shadow of right; that the assassination of Ruiz, an American citizen, was the act of Spanish officials who held him in custody unwarranted by the treaty rights and that no reparation had been made for such act, although it had been demanded by the Government: that of fifty million dollars of property in the island of Cuba belonging to the citizens of the United States, much had been destroyed by the acts of Spain, and that she was unable or unwilling to prevent destruction of the remainder; that claims on file in the Department of State against Spain, for indemnity for this destroyed property then amounted to about sixteen million dollars; that Spanish military officers had levied contributions upon American planters as the price for the preservation of their estates and the continuance of their agricultural operations. Annexed to the report, which consists of over 600 pages, are statements of many claims filed with the Department of State, and which the records of this Court show have been presented to it for adjudication.

The report concludes by recommending the resolutions which were adopted on April 20th, 1898, with the addition of the fourth section disclaiming the intention of acquiring the island of Cuba.

It will be noticed that the resolves are based upon a preamble which refers to the abhorrent conditions which have existed for three years in the island of Cuba, as well as to the destruction of the *Maine*. The Attorney-General's proposition that the destruction of the *Maine* was the cause of the war is based exclusively upon the fact that such destruction was referred to in the preamble of the resolutions of April 20th; his proposition, therefore, cannot be sustained as to the destruction of the *Maine* causing the war without having the same effect as to every other

act mentioned in the Committee's Report ; that is, the imprisonment of Ruiz, the execution of Lopez, and the acts and depredations which were the basis of the claims filed by American citizens with the State Department, and amounting at the time of the report to over sixteen million dollars, all of which are now before this Court for adjudication.*

This joint resolution was passed by both Houses of Congress on April 19th; it became a law by approval of the President on April 20. What subsequently transpired appears from the President's message transmitted to Congress on April 25, 1898 (*Cong. Record*, p. 4248), in which he stated that he had communicated to the Spanish Minister in Washington the demand which it had become the duty of the Executive to address to the Government of Spain in obedience to said resolution, and that thereupon the Minister had asked for his passports and withdrawn from this country; that the United States Minister at Madrid was in turn notified by the Spanish Minister for Foreign Affairs that the withdrawal of the Spanish representative from the United States had terminated diplomatic relations

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* The resolutions are as follows: (The preamble and first, second and third resolutions are identical as recommended and as adopted; the fourth resolution was added after the report was received. 30 U. S. St. at L., p. 738).

[PUBLIC RESOLUTION—No. 21, 30 U. S. Stat. at L., p. 738.]

JOINT RESOLUTION for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Whereas the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited. Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, First. That the people of the island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States, the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.

Approved, April 20, 1898.

between the two countries, and that all official communications between their respective representatives ceased therewith.*

The President also referred to a note addressed to the United States Minister at Madrid by the Spanish Minister of Foreign Affairs that the Government of Spain had treated the reasonable demands of this Government as measures of hostility and had followed that with instant and complete severance of relations by its actions which, in the usage of nations, accompanies an existing state of war between sovereign powers; he further stated that he had been constrained in exercise of the power and authority conferred by the resolutions to proclaim a blockade of a portion of Cuba, and that he recommended the adoption of a joint resolution declaring that a state of war existed between the United States of America and the Kingdom of Spain.

On April 25, 1898, Senator Allen introduced a joint resolution† declaring the existence of a state of war *since the 15th day of February*, 1898, between the United States and Spain, which was committed to the Committee on Foreign Relations. After the receipt by the House of Representatives of the President's message aforesaid, there was presented from the Committee on Foreign Affairs of that body an act‡ declaring that war exists between the United States and the Kingdom of Spain since the 21st day of April, 1898, including said date.

The *Congressional Record* shows that there was some question raised as to whether the title of the act was co-extensive with its terms, and thereupon the statement was made that the bill had been drawn by the Attorney-General of the United States.

The act as passed by the House, and immediately transmitted to and passed by the Senate, declared that war existed and had existed since April 21, 1898, including said day,§ and this date was adopted notwithstanding the fact that there were then pending in the House of Representatives, and in the Senate the resolution introduced by Senator Allen, and other resolutions to the effect that war be declared to exist from the 15th day of February, 1898.

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* See also U. S. Foreign Relations for 1898, pp. 761 *et seq.*

† S. R., 158.

‡ H. R., 10,086, *Cong. Record*, 4252.

§ CHAP. 189.—*An Act Declaring that war exists between the United States of America and the Kingdom of Spain.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, Anno Domini eighteen hundred and ninety eight, including said day, between the United States of America and the Kingdom of Spain.

Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this Act into effect.

Approved, April 25, 1898. (30 U. S. Stat. at Large, p. 364.)

The act was prepared by the Attorney-General and passed by both Houses of Congress, and the care taken to declare that the war existed *from* the 21st day of April, *including said day*, is evidence on the face of the bill that it was the intention of both of the political departments of the Government to declare that war did not exist prior to the 21st day of April, and that the cause of the war was the statement in the message of the President of April 25 that Spain had refused the reasonable demand of the United States to withdraw from the island of Cuba and had treated that demand as a hostile act, and that Spain herself had taken the initiative in declaring war not only by the manner in which the demand was received but by subsequent acts which could only be considered as those of war.

The proposition that the destruction of the *Maine* was the cause of the war with Spain has been advanced by the Attorney-General regardless of the awkward position in which it places the executive and legislative departments of this Government, as one of the most important principles of international law, which this nation is bound to support.

Every department of the Government of the United States is committed to the settlement of disputes between this and foreign countries by arbitration instead of war, and it is not possible that this Court should in its initial decision place itself upon record that the political departments of this Government violated the principle of international law to which this country is committed above all others.

The Attorney-General's position, therefore, that the destruction of the *Maine* was the cause of the war cannot be sustained without placing the United States on record that it refused the offer of a foreign nation to arbitrate a question in dispute between them and to respond to any award resulting from such arbitration, but that within three weeks after such offer of arbitration was made they deliberately declared war for the cause which the other nation had offered to submit to arbitration.

The declaration of war with Spain and the causes which led up to it are so fresh in the minds of the Court and counsel that it is almost impossible in an argument of this nature not to refer to current history and to those matters which are necessarily uppermost in our minds when this subject is discussed, and it therefore came as a surprise to the counsel of the claimants that at this late date the Executive Department of the United States, after all of the efforts which it has made during the past four years to disassociate the war with Spain with the destruction of the *Maine*, should come forward and, as a means of avoiding liability for the claims of its citizens which were sacrificed for the public welfare in obtaining peace, and assumed by the treaty which terminated the war, now declare for the first time that the war with Spain was caused by the destruction of the battleship and was declared notwithstanding the offer of the Spanish Government to arbitrate the question of liability therefor.

EIGHTH.—A treaty of peace does not, under the principles of international law, necessarily obliterate the claims of citizens of either country against the other, even though such claims were connected with the causes of the war terminated by the treaty of peace.

The legal elements of the proposition upon which the Attorney-General attempts to support his demurrers are based upon the proposition that a treaty of peace necessarily obliterates all claims of the citizens of one country against the government of the other which are in any way connected with the causes of the war terminated by the treaty. He declares, although his citations fail to sustain him, that this is one of the principles of international law which has been recognized and adopted by civilized nations.

It has already been demonstrated that the destruction of the *Maine* was not the cause of the war with Spain, but, even assuming for the purpose of the argument that such was the case, the Attorney-General's proposition is not tenable.

In subsequent points it will be shown that even if this principle were recognized under the rules of international law, its only possible application would be as to the relations of the Government of the United States to the Government of Spain, and it would not, because it could not, in any manner, affect the relations of the United States with those of its citizens whose claims were sacrificed; and that even if the principles of international law were correctly stated by the Attorney-General they would have to give way to the peculiar protection afforded to citizens of the United States by the Constitution.

The leading authorities on international law, however, do not support the Attorney-General in his fundamental proposition; in order to sustain his position he must demonstrate that a treaty of peace not only obliterates claims of the citizens of each country against the government of the other country, if such claims were in any way connected with the causes of war, but that it also relieves the governments from indemnifying their citizens for the claims which are thus obliterated for the general welfare of the country.

It is undoubtedly true that any government exercising national and sovereign functions is competent through its treaty-making power, and the exercise of the right of eminent domain, to make a treaty with another government, whether such treaty be of peace or of any other nature, containing stipulations by which the claims of its citizens are satisfied and obliterated as against such other government. It also may be true that in the absence of constitutional provisions protecting them, the citizens' only opportunity to obtain compensation for the claims thus

sacrificed is through the voluntary act of their own government, as the right to claim compensation from, as well as to sue, the sovereign, as a general rule, can only be exercised by the sovereign's own consent.

While, however, it is competent for governments to thus sacrifice the claims of their citizens, the mere fact of the conclusion of a treaty of peace does not obliterate such claims without special expressions to that effect, and this applies equally to claims connected, as well as to those unconnected, with the causes of the war.

The Attorney-General's proposition amounts to this: Had the destruction of the *Maine* been the only incident marring the friendly relations between Spain and the United States, and the United States had demanded reparation therefor, Spain had refused, war had been declared with a distinct statement in the declaratory act itself that it was waged solely on account of the destruction of the *Maine*, and a treaty of peace had subsequently been entered into containing the same relinquishment as against Spain, and assumption by this Government, as is contained in the Treaty of Paris, the United States would be under no legal or moral obligation whatsoever to satisfy its own citizens for whose sake the war was undertaken, and who more than any other persons would be entitled to indemnity.

If the Attorney-General correctly states the rule, the greater the loss to the citizen, the more flagrant and pronounced the injury, the less opportunity there is for him to recover his claim, the justice of which is necessarily recognized by the resort to war to enforce it.

Had Great Britain refused to arbitrate the Alabama claims, and had it been necessary for the United States to resort to warlike methods to obtain the indemnity demanded therefor, the fact that the war had been waged to collect those very claims would, under the Attorney-General's proposition, relieve this Government from all obligation to indemnify the claimants.

Daniel Webster, while a Senator of the United States, delivered a speech on the French Spoliation Claims, in which he reduced to a complete absurdity the proposition that a war waged until peace is obtained obliterates the claims connected with its causes.*

In fact, according to the Attorney-General's proposition, all that claimants against a foreign government, whose claims are in any way

* "The mere fact of war can never extinguish any claim. If, indeed, claims for indemnity be the professed ground of war, and peace be afterwards concluded without obtaining any acknowledgment of the right, such a peace may be construed to be a relinquishment of the right on the ground that the question has been put to the arbitration of the sword, and decided. But if a war be waged to enforce a disputed claim, and it be carried on till the adverse party admit the claim, and agree to provide for its payment, it would be strange indeed to hold that the claim itself was extinguished by the very war which had compelled its express recognition. Now, whatever we may call that state of things which existed between the United States and France from 1798 to 1800, it is evident that neither party contended or supposed that it had been such a state of things as had extinguished individual claims for indemnifications for illegal seizures and confiscations" (4 Webster's Works, 163; 2 Wharton's Int. Law Dig., p. 674).

directly or remotely connected with causes of war, can expect to receive on the conclusion of a war waged on their behalf, is to be told that their wrongs have been avenged; their flag floats over a few thousand more square miles of territory than it did before the war; the offending Government has been punished by loss of life and territory, and with the return of peace, the claims for which they sought indemnity, and which their own government was bound to assert, on their behalf, have as to the personal elements thereof, been so completely obliterated, or, as it has been somewhat poetically expressed in the Attorney-General's brief, "passed forever into oblivion," that even their own government which has used their claims to obtain peace by surrendering them, is not bound to indemnify them in any manner whatever.

The Attorney-General has entirely confused the international relations of the Governments making the treaty and the rights of the citizens whose claims are sacrificed, and while the authorities which he cites might sustain his position, that *as between Governments* the causes of war pass into oblivion to such an extent that neither Government can make a demand upon the other Government for the same cause and renew hostilities on that basis, they do not sustain the other element that the citizens lose their right of indemnity against their own Government.

Chancellor Kent, whom he cites, expressly declares (169) that "the peace does not affect private rights which had no relation to the war," and the balance of that learned jurist's opinion on this subject completely sustains the claimant's position. Dana's Wheaton declares that the treaty of peace does not extinguish claims founded upon debts or injuries sustained prior to the war.

In fact, Section 538 of the original text of Wheaton's Elements, as it has been annotated by both Dana and Boyd, declares that "the power of concluding peace, like that of declaring war, depends upon the municipal constitution of the State."

And in Section 539, Mr. Wheaton declares: "The power of making treaties of peace, like that of making other treaties with foreign States is, or may be, limited in its extent by the national Constitution."

Prof. Theodore S. Woolsey says that peace is a return to a state of amity, and, in the absence of treaty stipulations, to intercourse on the old basis, and that the effect of a treaty on all grounds of complaint for which a war was undertaken is to abandon them, but he qualifies the statement with the assertion by a practical admission that such is not the case as to private rights.*

* "Such is the case as far as public rights are concerned. But private rights, the prosecution of which is interrupted by war, are revived by peace, although nothing may be said upon the subject; for a peace is a return to a normal state of things, and private rights depend not so much on concessions, like public ones, as on common views of justice. And here we include not only claims of private persons, in the two countries, upon one another, but also claims of individuals on the government of the foreign country, and claims—private and not political—of each government upon the other existing before the war" (Woolsey's Introduction to the Study of Int. Law, 6th Ed., pp. 263 *et seq.*).

There are but few countries in which the right of the private citizen to just compensation for his property taken for public use is protected as thoroughly as it is in the United States by the Constitution; the writers, therefore, on international law, many of whom are foreigners, have not considered this point from our standpoint, when they have asserted that matters connected with causes of war are obliterated by a treaty of peace. The American authors whose views are cited in the Attorney-General's brief have all qualified their expressions on this subject with the statement that the effect of a treaty of peace depends, as between the respective Governments and their citizens on their own constitutional and municipal provisions.

There is no positive assertion in any of the authorities cited by the Attorney-General that claims of private citizens against the other Government pass into oblivion on the execution of a treaty of peace.

Halleck, who goes as far as any one, says a treaty of peace does not extinguish claims unconnected with the causes of the war. Some of the authorities do not discuss the question of the obliteration of such claims, but simply confine the expression of their views to a positive assertion that claims unconnected with the war survive a treaty of peace, and are unaffected thereby.

Phillimore (vol. 3, 3d edition, p. 867) says that if a war should happen to have been waged on account of an injury done to a private person, then the payment of his damages should be expressed; for it requires but a slight conjecture to found the remission of a penalty. But this language evidently shows that the remission has got to be in some way found from the terms of the treaty; it simply says that the presumption *might* be in favor of the remission on the general principle that claims ought to be remitted so as not to provoke a renewal of hostilities.

There is nothing, however, in these, or in any other statements, to sustain the Attorney-General or this Court in declaring that such expressions can be construed as admissions that claims that are connected with the war, are obliterated; such a proposition is not necessarily the converse of, or deducible from, the other.

In the case of the *Molly*, cited on the Attorney-General's brief (1 Dodson's Adm. Rep., 394), Sir William Scott (Lord Stowell) did declare that "when a treaty of peace has been concluded the revival of any grievances arising before the war comes with a very ill grace and is by no means to be encouraged. Treaties of peace are intended to bury in oblivion all complaints, and if grievances are not brought forward at the time when peace is concluded it must be presumed that it is not intended to bring them forward at any future time."

This, like Phillimore's assertion, carries out the views expressed by many writers on international law, especially those of foreign countries, who do not consider the effect of the constitutional provisions of this country, that a treaty of peace *ought*, from a moral standpoint, and for the sake of subsequent friendly relations between the two countries, to

emphatically dispose of all claims which were in any way connected with the war, in order to prevent their being revived, and possibly becoming the basis of bitter diplomatic controversy, and even of renewed hostilities.

The fact that these authors have urged the insertion of articles in treaties of peace positively releasing all claims connected with the causes of the war, clearly indicates that the proposition asserted by the Attorney-General is not a principle of international law which has become so universally accepted that it could in any way be binding upon citizens of the United States when property rights are at stake.

NINTH.—When the claims of citizens of either country against the other are obliterated by a treaty of peace, such obliteration is the result of the exercise through the treaty-making power of the right of eminent domain, sacrificing private property for public welfare, and under the principles of international law the government exercising such right is morally bound to indemnify its citizens for losses thus sustained.

From the earliest time until the present, writers on international law have asserted the principle that indemnity to citizens must go hand in hand with the right of their government to confiscate and sacrifice their claims against another government for the purpose of concluding a treaty of peace; and this applies to all claims, including those for which the war was waged.

The principle that private property cannot be taken for public use without just compensation is one of the fundamental principles upon which not only this, but many other governments are based. It far antedates the Constitution: it rests upon such a solid foundation that the framers of the Constitution did not consider it necessary to incorporate it in the instrument as originally prepared. In fact, the Bill of Rights, as the first ten amendments of the Constitution are called, was only incorporated in the Constitution in order to satisfy the demands of some of the State Conventions which ratified it. Many people believed that the enumeration of the various rights specified in those amendments might be prejudicial to those rights in their broadest conception, and many writers on constitutional law have considered that the adoption of the amendments, so far as affording protection to the rights and liberties of American citizens therein enumerated, was unnecessary.* Be that as it may, the principle that private rights cannot in any way be sacrificed for

* See 1 Story's Commentaries, §§ 300–305, pages 217 *et seq.*

the public welfare is one of the foundation stones upon which this Government is built.

In *Ware* vs. *Hylton*,* in which five of the judges delivered opinions, Mr. Justice Chase, in the leading opinion of the Court, held that the Congress under the Confederation had the power to sacrifice rights and interests of private citizens in order to secure the safety or prosperity of the public. As the treaty of peace with Great Britain of 1783 was under consideration, he could not base his views as to the necessity of indemnifying citizens whose claims were sacrificed upon the constitutional provision, but he based it upon the fundamental principles of justice. In the course of his opinion he says (p. 245) that the immutable principles of justice, the public faith of the States that confiscated and received debts pledged to the debtors and the rights of the debtors violated by the treaty, "all combine to prove that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public." To this he added: "The principle is recognized by the Constitution, which declares 'that private property shall not be taken for public use without just compensation.'" He cites Vattel (Lib. 1, c. 20) in support of the general principle, and adds that it is evident that the debtors "ought to be indemnified, and it is not supposed that those whose duty it may be to make the compensation will permit the *rights* of our citizens to be sacrificed to a *public object* without the fullest indemnity." The fact that the italicised words are so in the original shows what stress the Court laid upon the claims of citizens' being property rights, and confiscation of them to procure a treaty of peace being a public use.†

* U. S. Supreme Court, 1796, 3 Dallas, 199.

† **Extract from Grotius on War and Peace,** Bk. III., Chap. XX., n. XVI. "Yet those Debts, which were due to private Persons at the beginning of the War, are not to be accounted forgiven, for these are not acquired by the Right of War, but only forbidden to be demanded in time of War; therefore the Impediment being removed, *i. e.*, the War ended, they retain their full Force. But tho' it ought not to be easily presumed, that what was a Man's Right before the War is taken from him, for this Cause chiefly (as *Cicero* well observes), Civil Societies were first constituted, that every one might keep his own, yet this must be understood of that Right, which is derived from the Inequality of Things.

XVIII.—There is not the same Reason that private Men should be thought to remit the Right of demanding Punishment, because this may without War be judicially required; but since this Right is not ours in the same manner, as that, which arises from Inequality, and besides Punishments having always something odious: The slightest Conjectures that may be drawn from the Terms of the Treaty, are sufficient to found a just Presumption, that this also is passed by.

XIX.—But whereas we have said, that the Right, which we had before the War, should not easily be thought to be remitted, this indeed holds very true in the Right of private Men. But as to the Right of Kings and Nations, a Remission may be more easily presumed, if the Terms of the Treaty, or probable Conjectures drawn from them, lead us to that Interpretation; but especially if the Right in question were not clear, but in dispute. For it is humane to believe that those who make Peace intend sincerely to stifle the Seeds of War (London edition, 1737)."

TENTH.—The principle of international law, as stated in the foregoing point, as to the moral obligation of Governments to indemnify their citizens for claims against a foreign Government, sacrificed for the purpose of making peace, has been incorporated, as an inalienable right of citizens of the United States, in the Constitution (Art. V. of Amendments); and citizens of the United States whose claims are thus sacrificed for the public welfare are entitled to just compensation and may assert their claim therefor in any Court to which Congress gives jurisdiction, and this rule applies to claims of every nature, even though they were the cause of war terminated by a treaty of peace.

If it can be demonstrated that a claim of a citizen of the United States against a foreign Government is a property right, and if the remission or the obliteration of the same is a taking of private property for the public welfare, it necessarily follows that the citizen whose property is sacrificed must be awarded just compensation. In this respect it matters not whether the right of eminent domain on the part of the Government is exercised for the purpose of securing the resumption of peace after hostilities commenced, or to prevent an outbreak of hostilities, or to maintain a continuance of peaceful relations before hostilities have actually commenced.

In support of their claims the petitioners contend:

(*a.*) Claims of citizens of the United States against foreign powers are property rights.

(*b.*) The obliteration of claims of its citizens against a foreign Government by treaty between the United States and that Government is an exercise of the right of eminent domain and a taking of private property for public use within the meaning of Article V. of the Constitution of the United States.

(*c.*) The principle of just compensation for taking private property for public use is applicable to claims sacrificed to obtain a treaty of peace as well as to those in which the treaties are concluded during a time of peace.

(*a.*) *Claims of citizens of the United States against foreign powers are property rights.*

It seems almost unnecessary to cite any cases in support of this proposition; a few references, however, will be given.

Mr. Justice Story held in 1828* that "the right of indemnity for an unjust capture, whether against the captors or the sovereign, whether remediable in his own courts or by his own extraordinary interposition and grants upon private petition or upon public negotiation is a right attached to the property itself and passes by cession to the use of the ultimate sufferer." In the case cited the Court decided that the claim of a citizen of the United States against Spain for an unjust capture of his vessel was not only a property right, but was one of such a tangible nature that it passed under a general assignment of an insolvent debtor to his assignee, and that it so passed even before the United States had negotiated with Spain a treaty indemnifying it for the losses sustained by its citizens for depredations upon American commerce.

This decision rendered, as it was, by one of the ablest jurists who ever sat upon the bench of the highest Court in this or in any other country, has been followed so repeatedly that it has become an elementary principle of the law as it is administered in the constitutional and statutory courts of this country.†

(*b.*) *The obliteration of claims of its citizens against a foreign government by treaty between the United States and such government is an exercise of the right of eminent domain and a taking of private property for public use within the meaning of Article V. of the Constitution of the United States.*

It would be impossible to give a complete list of all the treaties between the United States and foreign powers in which claims of citizens have been surrendered. Most of them have provided for some method of ascertaining the amounts of the claims surrendered, and all of that class will be found in Moore's History of International Arbitration, together with an account of the proceedings based thereon. The frequent exercise of this right is evidenced by the fact that, up to 1896, the United States had participated in fifty-two arbitrations for the settlement of claims, and in many cases the claims of citizens of this country were surrendered

* *Comegys* vs. *Vasse*, U. S. Supreme Court, 1828, 1 Pet., 193, p. 215.

† Some of the many cases in which it has been followed are:

Williams vs. *Heard*, U. S. Supreme Ct., 1891, 149 U. S., 529, LAMAR, *J.*
Phelps vs. *McDonald*, U. S. Supreme Ct., 1878, 99 U. S., 298, SWAYNE, *J.*
Clark vs. *Clark*, U. S. Supreme Ct., 1854, 17 Howard, 315, CATRON, *J.*
Leonard vs. *Nye*, Mass. Supreme Ct., 1878, 128 Mass., 455, GRAY, *Ch. J.*
Delafield vs. *Colden*, N. Y. Ct. Chan., 1828, 1 Paige, 139, WALWORTH, *Chan.*
Lewis vs. *Bell*, U. S. Supreme Ct., 1854, 17 Howard, 616, GRIER, *J.*

and barred as against the foreign government, and assumed by the United States.*

(*c*.) *The principle of rendering just compensation for taking private property for public use is applicable to claims sacrificed to obtain a treaty of peace, as well as to those in which the treaties are concluded during a time of peace.*

Fortunately, the United States has had occasion to conclude very few treaties of peace. We have already seen that the Supreme Court considered that the principle of just compensation for claims of citizens sacrificed applied to the treaty of peace negotiated by the Confederation; the United States indemnified its citizens for claims sacrificed in terminating the strained relations between this country and France in 1800 and 1803, and also those sacrificed in concluding the treaty of peace between this country and Mexico after the war of 1846.

On numerous occasions, however, treaties have been concluded by the United States with foreign powers, which were practically treaties of peace because they were concluded for the purpose of avoiding the actual hostilities which would undoubtedly have ensued had such treaty not been concluded. The treaty of 1819 with Spain, by which Florida was ceded to this country, was the only means by which a war was averted between this country and Spain on account of the depredations committed on our commerce by that country, and the menace which Florida was at that time to the peace of this country. Claims of our citizens were extinguished as against Spain, the United States assumed them and settled them. In 1842 the relations between this country and Great Britain became so acute that troops of both countries were mobilized on the border line. By the diplomatic ability of Daniel Webster and Lord Ashburton, the treaty known by their names was consummated, and the American owners of property which passed from under the sovereignty of the United States to that of Great Britain, were compensated for the losses sustained by them.

ELEVENTH — Treaties of peace stand on the same footing as all other treaties made by the United States.

Counsel for the Government are evidently endeavoring to create the impression that there is some subtle difference between the effect of a treaty of peace, and of other Conventions between the United States and a foreign power extinguishing the claims of its citizens. As a matter of

* *Comegys* vs. *Vasse*, U. S. Supreme Ct., 1828, 1 Peters, 193, 216, STORY, *J.*
Phelps vs. *McDonald*, U. S. Supreme Ct., 1878, 99 U. S., 298, 303, SWAYNE, *J.*
Williams vs. *Heard*, U. S. Supreme Ct., 1891, 140 U. S., 529, LAMAR, *J.*

fact, however, there is no distinction whatever between treaties of peace and other treaties. All treaties are concluded and ratified under the treaty-making power of the United States, and the effect so far as citizens of this country are concerned is necessarily the same.

An effort was made in the Constitutional Convention to discriminate between treaties of peace and other treaties, and Mr. Madison, on Friday, February 7th, 1787, moved to insert the words "except treaties of peace" after the ratification clause of the treaty so as allow them to be made with less difficulty than other treaties. His motion was agreed to at the outset, but in the course of the discussion Mr. Gerry declared that in treaties of peace "a greater rather than a less proportion of votes was necessary than in other treaties. In treaties of peace the dearest interests will be at stake, as the fisheries, territories, &c. In treaties of peace also there is more danger to the extremities of the continent of being sacrificed than on any other occasion." On that day Mr. Madison's motion was adopted, but on the following day, Mr. King moved to strike out the exception as to treaties of peace and the added clause to that effect was struck out after a debate in which Mr. Wilson, of Pennsylvania, Mr. Gouverneur Morris, Mr. Gerry, Mr. Sherman and Mr. Madison participated.*

Chancellor Kent, in his Commentaries, says:†

"The department of the Government which is entrusted by the Constitution with the treaty-making power is competent to bind the national faith in its discretion, for the power to make treaties of peace must be co-extensive with all the exigencies of the nation. * * * All treaties made by that power become of absolute efficacy; they are the supreme law of the land." He cites the case of the *Peggy*, 1 Cranch, 103, in which Chief Justice Marshall declared that individual rights and vested rights of citizens might be sacrificed by treaty for national purposes, and he also cites *Ware* v. *Hylton* (3 Dallas, 199, 245) as authority that private rights might be sacrificed to secure public safety. He, however, bases the entire right to make treaties of peace and even to alienate territory for that purpose on the constitutional treaty-making power of the United States, and at once accompanies it with the statement that "the Government" would be bound to make compensation and indemnity to the individuals whose rights had thus been surrendered. The views of Mr. Wheaton, cited in a previous note, are that "The power of concluding peace, like that of declaring war, depends upon the municipal constitution of the State." He also says:‡

"The power of making treaties of peace, like that of making other treaties with foreign States, is, or may be, limited in extent by the national Constitution. We have already seen that a general authority to make

* Madison papers, vol. 3, pp. 1518–1528.

† 14th Ed., pp. 200 *et seq.*

‡ 508 Boyd's 3d English Edition, p. 623.

treaties of peace necessarily implies a power to stipulate the conditions of peace. * * * The duty of making compensation to individuals whose private property is thus sacrificed to the general welfare is inculcated by jurists as correlative of the sovereign right of alienating the things which are included in the eminent domain." Halleck, quoting both Wheaton and Kent, says that the treaty-making power is bound by the fundamental law of the constitution of the State, and the only exception made by Halleck, Wheaton or Kent as to compensation to individuals is when a State is obliged for purposes of peace to cede territory they are not necessarily obliged to indemnify the persons whose territory is so ceded.

It can easily be seen that this is not the same as a sacrifice of property, as it is simply a transfer of sovereignty, the ownership of the property not being affected, whereas in the case of claims the property right itself is not simply relegated for adjudication to courts of another country, but is absolutely destroyed. The United States, however, indemnified the owners of property which passed from under its sovereignty to that of Great Britain by the Webster-Ashburton treaty of 1842.

TWELFTH.—The United States relinquished all claims for indemnity, national and individual, of every kind, of its citizens or subjects, which arose since the beginning of the late insurrection in Cuba, and this includes all claims of every nature regardless of whether they were connected with the war or not.

The effort made in this proceeding to avoid responsibility for one class of claims is unworthy of the Government of the United States. The claims of its citizens against Spain, which the United States assumed by Article VII. of the Treaty and agreed to settle and adjudicate, included every claim which arose since the beginning of the insurrection in Cuba, which date has been generally fixed as February 25, 1895, and it is not now within the power of the United States to say that it did not agree to adjudicate and settle any claim which arose since that date.

The relinquishment clause, so far as these claimants are concerned, is even stronger than though it had been general, for it includes all claims except those which are before a specified date, and the exception in the article of claims which arose prior to February, 1895, is evidence on its face that certain claims were to be excluded, and therefore, under the principle of *expressio unius exclusio alterius*, there can be no exceptions to the assumption other than those, which were specified in the article, and no exception can be presumed on any general principle whatsoever.

There can be no doubt that in making the treaty of peace the United States could have demanded an indemnity for the *Maine* both for national and for individual loss, and even if there were a general rule of international law, as asserted by the Attorney-General, that where nothing is specified in the treaty, indemnity claims connected with the causes of the war pass into oblivion, there is no rule that prevents the victorious power from demanding an indemnity for those causes. And if the United States Government could have demanded on behalf of its citizens an indemnity for the *Maine*, but instead of so doing, it relinquished all claims, national and individual, the presumption must be that there was a relinquishment of the claims for the sufferers of the *Maine* disaster for which the American Commissioners could have demanded indemnity had they seen fit, and the agreement in the second paragraph of Article VII. between the United States and its citizens to adjudicate and settle the claims released is sufficiently broad to include each and every claim of all classes which could possibly have been demanded by the United States from Spain at that time.

In the case of *Aspinwall* vs. *Venezuela*, the question of jurisdiction was raised in regard to the character of the claims, and the Commission assumed jurisdiction on the ground that where all the claims were referred to a Commission by a Convention, limited only by a time qualification, no question of the *character* of claims could be raised so as to prevent the Commission from taking jurisdiction.*

THIRTEENTH.—Treaties by which rights of citizens are affected must be construed liberally for the individuals.

On these demurrers the Attorney-General practically admits for the purpose of the argument, if, in fact, he does not actually assert, that the petitioners at one time had claims, but that they were extinguished by the treaty of peace, as against Spain, in the same manner that other claims were released, without, however, being similarly assumed by the United States; he seeks to find the extinguishment by the forced construction of a clause in which words have to be interpolated in order to sustain his position.

* In this case, which has already been referred to at length under another point (see pp. 14 *et seq.*, *ante*), the Commission considered carefully the construction of treaties and their effect upon rights of individuals, and in regard thereto, after citing Mr. Justice Story in *Shanks* vs. *Dupont* (3 Pet., 249); *Haimstein* vs. *Lynham* (100 U. S., 483), and Grotius (De Jure Belli ac Pacis, Book 2, chap. 16), decided that the most liberal exposition and construction of a treaty was to be adopted (Moore's History of Arbitration, pp. 3624–3626).

The familiar rule of interpretation of treaties originally laid down by Vattel, which has been cited on other briefs in these cases, and which is now an elementary principle of law, is that "It is not allowable to interpret that which has no need of interpretation."

The expression, "all claims of every nature, except those arising prior to February 18, 1895," cannot be twisted into the expression "all claims which might have passed into oblivion by a treaty of peace had they not been expressly saved therefrom by the terms of the treaty."

In the construction of treaties which operate directly upon individual rights, the individual is always protected, and this is especially true where the treaty contains provisions confiscating the individual's property and indemnifying him therefor.

All penal, confiscatory and tariff statutes are construed strictly against the Government and all remedial statutes are construed liberally for the person whose rights are affected. These are elementary principles of law, which apply not only to treaty rights but to all rights of citizens which are affected by governmental action.*

In construing Article VII. of the Treaty of Peace, every presumption must be in favor of the American citizen whose claims were sacrificed for the purpose of terminating a war, which was causing, outside and beyond the horrors of war and loss of life, expenditures which exceeded every three days the total amount asked from this Commission by those who suffered from the destruction of the *Maine*, and this Court will not hold that when the Commissioners of the United States were in a position to demand indemnity for the ship and individual, and they waived all claims of every kind, that any presumption exists that they expressly excepted from such demand indemnity for these sufferers, who, more than any others, were entitled thereto.

The Attorney-General now asks the Court to say that that cession was for expenses of the war and indemnity to American citizens, except those which had in any way occasioned the war, that is, that every claim of the United States, national and individual, was covered by this relinquishment, except the particular claims now under discussion.

The records, however, of the Commission indicate that claims of every nature, including the expenses of the war, were under consideration by the Commissioners in Paris. On November 28, 1898, Mr. Moore cabled to Mr. Hay that "Spain offered to relinquish her sovereignty over Cuba and cedes to the United States the Philippines, Porto Rico and Guam as compensation for the expenses of the war and as indemnity to American citizens for injuries suffered since the beginning of the last Cuban insurrection." This was directly in line with Secretary Day's letter to the Duc d'Almodovar del Rio, of July 30, 1898, preliminary to the peace negotiations, culminating in the protocol of August 12, 1898, and in which he declared that the President was so desirous of exhibiting signal

* *Powers* vs. *Barney*, 5 Blatchf., 202; *U. S.* vs. *Ullman*, *Fed. Cas.* No. 16, 593; *Hartranft* vs. *Wiegman*, 121 U. S., 609; *U. S.* vs. *Wigglesworth*, 2 Story, 369.

generosity that he would not make any pecuniary demands for indemnity for the war, but that he would have to demand the cession of Porto Rico, therefor, and for claims of citizens, for injuries to persons and property during the war.*

The Attorney-General now asks this Court to decide that the "signal generosity" of President McKinley was simply, so far as these claimants are concerned, a ruthless sacrifice of the claims of American citizens, not only in defiance of public sentiment, but also of Constitutional protection. Surely this Court will not so flagrantly misinterpret the *signal generosity* of that man whose every action was not only indicative of the highest regard for national welfare, but also of a deep and tender regard for the individual welfare of American citizens, and especially of our soldiers and sailors (for was he not one of them himself) and of their widows and orphans. Let the Attorney-General read, if he will, the words of our martyred President, about the destruction of what he called our "noble vessel" while in the Harbor of Havana "on a mission of peace and rightfully there," and of the "sorrow to the nation and grief to the home," and then let him—if he dare—repeat his assertion to this Court that William McKinley, in announcing the terms of peace to a vanquished foe, when he was in a position to dictate terms which would protect the just claims of American citizens, either forgot to include, or expressly excluded, the claims of the sailors and the widows and orphans who had so terribly suffered in the destruction of our noble warship.

FOURTEENTH.—The claims extinguished by the treaty of 1898, and described as "all claims for indemnity, National or individual, of every kind," necessarily included the claims of these petitioners.

The intention of the treaty of Paris to include all claims whether they were connected with the cause of the war or not is evidenced by the use of the descriptive words "all claims for indemnity, National or individual, of every kind." It is impossible to conceive of any broader description and there can be no doubt that the claims are "individual claims for indemnity" and were included in the relinquishment.

* "The President, desirous of exhibiting signal generosity, will not now put forth any demand for pecuniary indemnity. Nevertheless, he cannot be insensible to the losses and expenses of the United States incident to the war, or to the claims of our citizens for injuries to their persons and property during the late insurrection in Cuba. He must therefore, require the cession to the United States, and the evacuation by Spain, of the Islands of Porto Rico and other islands now under the sovereignty of Spain in the West Indies, and also the cession of an island in the Ladrones to be selected by the United States" (U. S. For. Rel., 1898, p. 821).

The distinction between "National" and "individual" claims against foreign governments has been discussed on many occasions and there can be no doubt that "National" claims for indemnity are those for which the United States can collect and retain indemnity for losses sustained by the government in property and expense, or when pecuniary damages are demanded, for insult to the flag; while "individual" claims are those which citizens of this country have against a foreign government for loss and damages actually sustained and for which a foreign government is responsible.

Some confusion has at times arisen from the fact that claims of citizens of any country cannot be enforced against a foreign government except through the Government of the injured party, and when a government takes up and presses such claims of its citizens it makes their individual grievances a National matter.

In such sense the claim of the individual may become the basis of a national demand, but in no sense does the claim ever lose its character of being the personal or individual property right of the claimant.

In all cases in which injury to public vessels is involved, national and individual claims arise; both are wholly under governmental control as against the foreign country, but as to the national claim, the government can release the claim for whatever amount it is willing to accept, while as to the individual claims, it must compensate those whose property rights it has sacrificed for the public good.

This subject has already been treated at length under another point and it will only be briefly referred to again.*

The fact is the words "national" and "individual" were used in the treaty in the same way as the words "of every kind," so that Spain should be released from every possible claim which could be presented by the United States, either for itself or for its citizens. The words national and individual are not used in the adjudication clause; by that the United States simply agreed to adjudicate and settle the claims of its citizens against Spain which were relinquished. If any citizen was prejudiced by the relinquishment of a claim he is protected whether his claim is one in which no other person is interested, or whether other persons or the Government of the United States is also interested in it. Counsel for the Government have dwelt at great length on the distinction between national and individual claims. The point is not involved in the jurisdiction of this Court. Every claim of every citizen whether it had to be presented through the Government or not is included in the adjudication clause of Article VII.†

* See pp. 21, 22, *ante*.

† The following extract from the opinion of DAVIS, *J.*, in *Gray* vs. *United States*, one of the leading French Spoliation cases decided by the Court of Claims in 1886 (21 Ct. of Clms., 340), throws a great deal of light on the terms National and individual when applied to claims against foreign governments. On pp. 391–3, Judge DAVIS says:

"The word 'National' has been largely used in argument in allusion to the different kinds of claims at different periods brought into the discussion, and is a convenient word

One test which is frequently although not always applied to ascertain whether claims are individual or national is the disposition of the indemnity received. Any money received by the United States for indemnity for a national claim must of course eventually find its way into the treasury of the United States, whence it can only be withdrawn under some Congressional authority. On the other hand indemnities for individual claims are always paid to the United States, but they are as a general rule received by the Executive Department of the Government, and paid over by it directly to the parties entitled thereto. This was the method adopted in regard to the *Virginius* indemnity paid by Spain, the *Huesken* indemnity paid by Japan, the *Baltimore* indemnity paid by Chile. Many other instances might be cited, but the members of the Court are too familiar with this practice of the Government to render any further citations necessary.

It sometimes happens, however, that when both National and individual claims are included in one sum, the amount is covered into the

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if clearly understood in the connection in which it is used. All claims are 'National' in the sense of the *jus gentium*, for no Nation deals as to questions of tort with an alien individual; the rights of that individual are against his Government, and not until that Government has undertaken to urge his claim—not until that Government has approved it as at least *prima facie* valid—does it become a matter of international contention; then, by adoption, it is the claim of the Nation, and as such only is it regarded by the other country. The name of the individual claimant may be used as a convenient designation of the particular discussion, but as between the nations it is never his individual claim, but the claim of his Government founded upon injury to its citizen. Nations negotiate and settle with nations; individuals have relations only with their own Governments. Other claims, sometimes the subject of argument, rest upon injury to the State as a whole; of these an apt illustration is found in the so-called 'indirect' claims against Great Britain, disposed of in the arbitration of 1872, and in the claims advanced by France for injury caused by non compliance with the treaties of 1778.

"Thus, while all claims urged by one nation upon another are, technically speaking, 'national,' it is convenient to use colloquially the words 'national' and 'individual,' as distinguishing claims founded upon injury to the whole people from those founded upon injury to particular citizens. Using the words in this sense, it appears that in the negotiations prior to the treaty of 1800, and in effect in the instrument itself, national claims were advanced by France against individual claims advanced by the United States. France urged that she had been wronged as a nation; we urged that our citizens' rights had been invaded. If 'national' claims had been used against 'national' claims, and the one class had been set off against the other in the compromise, of course the agreement would have been final in every way, as the surrender and the consideration therefor would have been national, and no rights between the individual and his own Government could have complicated the situation. But in the negotiation of 1800 we used 'individual' claims against 'national' claims, and the set-off was of French national claims against American individual claims. That any Government has the right to do this, as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him. A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his Sovereign, the citizen to his Government.

treasury and an Act of Congress passed directing the amounts to be paid to individuals to be paid out of the treasury.

Had the United States demanded and collected indemnity from Spain for the *Maine*, undoubtedly a lump sum would have finally been agreed upon and paid for all National and individual claims; the United States would have divided the amount received into two parts, one for the value of the vessel and the other for the individual sufferers, which would in its turn have been distributed amongst those entitled thereto either by Act of Congress or by some other method determined by Congress. The treaty settling the matter, however, might have provided for the payment to the United States of one sum for the loss of the ship and another for the sufferers, as well a method for the distribution of the latter as was done in the cases of the *Virginius* and the *Baltimore*. In any event the individual claims would have been paid, although the entire amount would have been paid to the United States.

A notable instance in which national and individual claims arose was that of the *Wyoming** affair, for which the United States received a large indemnity from Japan; after this fund had been held as special trust for many years, it was covered into the Treasury; the amount of the award which represented punitive damages for insult to the flag was given back to Japan; indemnity was retained, however, for all expenses of the Government and for each sailor and marine on the vessel attacked, and all payments were made from the Treasury by Act of Congress.†

In the *Chile-Baltimore* affair the United States could have demanded punitive damages for the national insult, but true to the doctrine announced in the *Wyoming* matter‡ it made no pecuniary demand therefor, except a suitable apology; but Chile was obliged to pay to the United States for the families of the murdered men who wore the uniform of the United States an indemnity "proportionate," as Secretary Foster expressed it, "to the gravity of the offense."§

In the *Virginius* affair of 1871, the National element of the claim against Spain and the right of the individual sufferers to indemnity was kept distinct; the former was eventually waived by the United States, but Spain was obliged to pay $80,000 to the United States for relief of the families of the sufferers on board of that vessel.‖

In the course of the many legislative debates, reports of committees and the judicial decisions on the French Spoliation claims, the distinction between the national and individual claims was frequently alluded to.

The only report which will be referred to at length is what may

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* See special sub-heading to Sixteenth Point, *post*.

† Act of February 22, 1883, 22 Stat. at L., p. 42.

‡ Sen. Doc. 231, 56th Cong., 2d Sess., Part I. p. .

§ U. S. For. Rel., 1892, under Chile, and see case referred to at length under special sub-head to Sixteenth Point, p. 52, *post*.

‖ U. S. For. Rel., 1875, pp. 1250–1251.

well be called the *famous* report on these claims of Charles Sumner,* in which he so ably urged the payment of debts which he declared were justly due to American citizens, and which had been sacrificed by the Government for the welfare of the nation. It was in the course of that report that he quoted the earnest wish of Governeur Morris, "that all our treaties, however onerous, may be strictly fulfilled according to their true intent and meaning," which he says was followed in language foreign to the phrases of diplomacy, by picturing the honest nation as that which, like the honest man,

> "Hath to its plighted faith, and vow forever stood;
> And though it promised to its loss, yet makes that promise good."

Part IV. of this Report is devoted to a careful analysis of claims of this nature and distinction between them and national claims. On page 300 he shows that when claims of this nature are taken by the Government in making a treaty the provisions of Article V. of Amendments that private property cannot be taken for public use without compensation are clearly applicable thereto.

This report, as it was adopted and twice readopted, stands as the clear cut expressions of that Committee of the Senate, which has always been composed of the most eminent authorities on international and constitutional law in that body; it asserts the moral and legal obligations of the Government of the United States to pay its obligations to its own citizens when assumed by a treaty with a foreign Government, and it was adopted as the basis of the legal decisions rendered in the French Spoliation cases.†

* Senate Document 231, 53th Congress, 2d Session. No. 41. Part 1. The report commences at p. 274. It was adopted April 4, 1864, and was readopted March 2, 1867 (p. 378), and readopted January 17, 1870 (p. 383).

† The leading French Spoliation cases are as follows:

Holbrook vs. *United States*, U. S. Ct. of Claims, 1884; 21 Ct. Claims, 434, Davis, *J.*

Cushing vs. *United States*, U. S. Ct. of Claims, 1886; 22 Ct. Claims, 1, Davis, *J.*

Gray vs. *United States*, U. S. Ct. of Claims, 1886; 21 Ct. Claims, 340, Davis, *J.*

Hooper vs. *United States*, U. S. Ct. of Claims, 1887; 22 Ct. Claims, 408, Davis, *J.*

The Brig William, U. S. Ct. of Claims, 1888; 23 Ct. Claims, 201, Scofield, *J.* Also reported under the names of *Haskins, Adams, Blagge* vs. *United States.*

The Ship Betsey, U. S. Ct. of Claims, 1888; 23 Ct. Claims, 277, Nott, *J.*

The Ship Jane, U. S. Ct. of Claims, 1889; 24 Ct. Claims, 74, Nott, *J.*

The Leghorn Seizures, U. S. Ct. of Claims, 1892; 27 Ct. Claims, 224, Nott, *J.*

The Brig Venus, U. S. Ct. of Claims, 1892; 27 Ct. Claims, 116, Nott, *J.* Also reported under *Cole* vs. *United States.*

The Ship Tom, U. S. Ct. of Claims, 1893; 29 Ct. Claims, 68, Nott, *J.*

The Ship Ganges, U. S. Ct. of Claims, 1896; 31 Ct. Claims, 175, Davis, *J.*

The Ship Star, U. S. Ct. of Claims, 1900; 35 Ct. Claims, 387, Weldon, *J.*

The Schooner Henry and Gustavus, U. S. Ct. of Claims, 1900; 35 Ct. Claims, 393, Weldon, *J.*

FIFTEENTH.—A moral duty rested upon the Government of the United States to present these claims to Spain, and it could not release them without assuming them.

A government may or may not present the claims of its citizens to a foreign government, but if for politic or Governmental reasons, it determines not to present claims that are proper, it is bound to assume the claims and indemnify the citizens whose claims are thus either sacrificed or rendered uncollectible.* This rule was laid down in the French Spoliation cases and has too often been asserted by writers on international law to require many citations to support it.†

The Ship Juliana, U. S. Ct. of Claims, 1900; 35 Ct. Claims, 400, PEELLE, *J.*
The Ship Parkman, U. S. Ct. of Claims, 1900; 35 Ct. Claims, 406, WELDON, *J.*
The Ship Apollo, U. S. Ct. of Claims, 1900; 85 Ct. Claims, 411, PEELLE, *J.*
The Ship Concord, U. S. Ct. of Claims, 1900; 35 Ct. Claims, 432, NOTT, *Ch. J.*
Balch vs. *Blagge*, U. S. Sup. Ct., 1896, 162 U. S., 439, FULLER, *Ch. J.*
U. S. vs. *Gilliat*, U. S. S. C., 1896; 164 U. S., 42, PECKHAM, *J.*

For a list of French Spoliation awards reported to Congress by the Court of Claims, see 23 Ct. Claims, 524; 24 *Id.*, 550; 25 *Id.*, 531; 26 *Id.*, 637.

* See also pp. 21, 22, *ante*, of this brief.

† On page 390, 21 Court of Claims, DAVIS, *J.*, says in his opinion in *Gray* vs. *United States*, which has just been referred to:

"The judiciary has seldom occasion to deal with the abstract right of the citizen against his government, for in a case raising such a question the individual is without remedy other than that granted him by the Legislature. The question of right, therefore, is usually passed upon by the political branch of the Government, leaving to the courts the power only to construe the amount and nature of the remedy given. Still judicial authority is not wanting in support of the position that by the agreement with France the United States became liable over to their individual citizens. Lord Truro laid down in the House of Lords as admitted law,

"'That if the subject of a country is spoliated by a foreign government he is entitled to redress through the means of his own Government. But if from weakness, timidity or any other cause on the part of his own Government no redress is obtained from the foreign one, then he has a claim against his own country' (De Bode *v.* The Queen, 3 Clarke's House of Lords, 464).

"The same position is sustained by that eminent writer upon the public law, Vattel, who held that while the sovereign may dispose of either the person or property of a subject by treaty with a foreign power, still, 'as it is for the public advantage that he thus disposes of them, the State is bound to indemnify the citizens who are sufferers by the transaction.'"

See also extract from Grotius, cited on page 709, § 248, vol. 2, Wharton's Int. Law Digest: "But we must also observe this, that a king may, two ways, deprive his subjects of their rights, either by way of punishment or by virtue of his eminent domain. But if he do it the last way it must be for some public advantage, and then the subject ought to receive, if possible, a *just* compensation for the loss he suffers out of the common stock" (Grot., War and Peace, 333, f. 2, ch. 14, § 7).

In the case of the *General Armstrong*, destroyed in 1814 by British naval neutral vessels in the harbor of Fayal, after many attempts to compel Portugal to pay the claim, a treaty was made in 1851 to refer "*the claim presented by the American Government in behalf of the captain, officers and crew*," of the vessel.* The Emperor Louis Napoleon was selected to act as arbitrator. He decided against the United States, on the ground that the officers and crew of the *General Armstrong* had resisted the attack instead of having invoked and relied on the protection which the neutral powers should have afforded. Congress afterwards appropriated the amount of the claim and paid it on account of certain errors in submitting the case.

The *General Armstrong* case is in line with these cases in one respect, which should be carefully noted. Many years before the amount of the claim against Portugal was allowed and paid, Congress had appropriated, and distributed among the crew of the vessel, $10,000 for prize money as a relief measure on the part of the United States.

The United States has never abandoned claims of its citizens against a foreign government. On the contrary, it has urged the payment of such claims at the very point of the bayonet and the mouth of the cannon, and if the Attorney-General should succeed on these demurrers it would be tantamount to obtaining a decision of this Court that the United States, in making the treaty of peace with Spain, abandoned not only the claims of its citizens, which were so just that, as the Attorney-General himself declares, they were the cause of a war costing hundreds of millions of dollars and thousands of lives, but it also abandoned its time honored and well adhered to policy of never sacrificing the just claims which any of its citizens have against any foreign government.

SIXTEENTH.—In construing Article VII. of the Treaty of Paris, the presumption must be in favor of the claimants, as they are officers, sailors and marines, or the widows and

* Art. II. of the Treaty of 1851 with Portugal is as follows: "The high contracting parties, not being able to come to an agreement upon the question of public law involved in the case of the privateer brig, *General Armstrong*, destroyed by British vessels in the waters of the island of Fayal, in September, 1814, Her Most Faithful Majesty has proposed and the United States of America have consented, that the claim presented by the American Government, in behalf of the captain, officers and crew of the said privateer, be submitted to the arbitrament of a sovereign potentate, or chief of some nation in amity with both the high contracting parties." (U. S. Treaties and Conventions, Ed. 1889, p. 897.) For the acts of Congress indemnifying the owners and other matters connected with this case see page 59 of this brief, *post*; see also 2 Wharton's Int. Law Digest, § 248, p. 714, for list of documents relating to case.

orphans of officers, sailors and marines of the Navy of the United States.

The United States has always protected its soldiers and sailors in foreign lands and has never made any distinction in demanding indemnity for injuries received in foreign lands between soldiers, sailors and other officials and citizens who have not held official positions.

It will be impossible to review all the occasions on which our soldiers, sailors and representatives in diplomatic and consular service have been ill treated in foreign countries in time of peace, and the United States has compelled the foreign nation to indemnify them for the injuries which they have sustained. In this point it is purposed simply to refer briefly to a sufficient number of such cases to show that it is not unusual for the United States to collect indemnity under such circumstances.

Our soldiers and sailors, officers, crew and marines, assume all risk of danger and of death when, in the course of their duty, they are attacked by an open enemy engaged in actual hostilities, but while they are on a mission of peace and rightfully in a friendly harbor, they are entitled to every possible protection which should be accorded to any other citizen of this country, and if they are killed, their government, so long as it classes itself amongst self-respecting governments, will insist upon indemnity for such acts alike to soldiers and sailors as to other citizens as Mr. Blaine demanded it from Chile in the *Baltimore* case, and as Secretary Foster declared in the same case: the indemnity must be proportionate to the gravity of the affair when the men wear the uniform of the United States.*

The Baltimore Case.

It is not necessary to seek for precedents prior to the present decade. In 1891, when our sailors from the *Baltimore*† were attacked in Val-

* The claimants under this point will cite the following cases; there are undoubtedly many other cases in which similar demands have been made and collected:

The Baltimore, U. S. *vs.* Chile, 1891, see p. 52.
The Chesapeake Sailors, U. S. *vs.* Great Britain, 1807, see p. 57.
The General Armstrong, U. S. *vs.* Portugal, 1814, see p. 59.
The Wyoming, U. S. *vs.* Japan, 1863, see p. 59.
The Water Witch, U. S. *vs.* Paraguay, 1855, see p. 60.
Attaché Huesken's death, U. S. *vs.* Japan, 1861, see p. 61.
Spanish Consuls in New Orleans and Key West, Spain *vs.* U. S., 1851, see p. 61.
Col. Margery's death, Great Britain *vs.* China, 1875, see p. 62.
British Sailors in Japan, Great Britain *vs.* Japan, 1862, see p. 62.
The French Corvette Dupleix, France *vs.* Japan, 1868, see p. 63.

† President Harrison in his 3rd Annual Message, Dec. 9, 1891, 9 Richardson, 185, says:

"On the 16th of October, 1891, an event occurred in Valparaiso so serious and tragic in its circumstances and results as to very justly excite the indignation of our people and

paraiso, Hon. James G. Blaine, the then Secretary of State, placed the right of this country to demand indemnity for men who were in our Naval and Military employ upon the duty of relf-respecting nations to protect their representatives and those who wore their uniform. On January 21, 1892, in his instructions to Mr. Egan he said, in words of no equivocal meaning:

"No self-respecting government can consent that persons in its service, whether civil or military, shall be beaten and killed in a foreign territory in resentment of acts done by or imputed to their government without exacting a suitable reparation. The Government of the United States has freely recognized this principle, and acted upon it, when the injury was done by its people to one holding an official relation to a friendly power, in resentment of acts done by the latter. In such case the United States has not sought for words of the smallest value or of equivocal meaning in which to convey its apology, but has condemned such acts in vigorous terms and has not refused to make other adequate reparation."*

to call for prompt and decided action on the part of this Government. A considerable number of the sailors of the U. S. S. S. *Baltimore*, then in the harbor at Valparaiso, being upon shore leave and unarmed, were assaulted by armed men nearly simultaneously in different localities in the city. One petty officer was killed outright and seven or eight seamen were seriously wounded, one of whom has since died. So savage and brutal was the assault that several of our sailors received more than two and one as many as eighteen stab wounds. An investigation of the affair was promptly made by a board of officers of the *Baltimore*, and their report shows that these assaults were unprovoked, that our men were conducting themselves in a peaceable and orderly manner, and that some of the police of the city took part in the assault and used their weapons with fatal effect, while a few others, with some well disposed citizens, endeavored to protect our men. Thirty-six of our sailors were arrested, and some of them, while being taken to prison were cruelly beaten and maltreated. The fact that they were all discharged, no criminal charge being lodged against any one of them, shows very clearly that they were innocent of any breach of the peace.

"So far as I have yet been able to learn, no other explanation of this bloody work has been suggested than that it had its origin in hostility to those men as sailors of the United States, wearing the uniform of their Government, and not in any individual act or personal animosity." See also Special Message of President Harrison to Congress on this subject of January 25, 1892, 9 Richardson's Messages, pages 215 *et seq*, and note especially his remarks on page 218 as to the effect of assaults on sailors on shore leave. These remarks are quoted at length in a subsequent note under this point.

* The remarks of Mr. Blaine were preceded by the following statement:

"I am directed by the President to say to you that he has given careful attention to all that has been submitted by the Government of Chile touching the affair of the assault upon the crew of the U. S. S. *Baltimore*, in the City of Valparaiso, on the evening of the 16th of October last, and to the evidence of the officers and crew of that vessel, and of some others who witnessed the affray, and that his conclusions upon the whole case are as follows:

"First. That the assault is not relieved of the aspect which the early information of the event gave to it, viz.: That of an attack upon the uniform of the U. S. Navy, having its origin and motive in a feeling of hostility to this Government, and not in any act of the sailors or of any of them.

The prompt demand made by Secretary Blaine resulted in a recognition by Chile of the claim, and it was subsequently settled, not, however, until the great statesman who had so ably enunciated many American principles had passed to his final rest. The negotiations were concluded by his successor, Secretary of State John W. Foster, who, in his dispatch of July 1st, 1892, to Mr. Egan, declared that the gravity of the offense was increased by the fact that the men wore the uniform of the United States.* Chile finally paid $75,000 indemnity† to the men who were injured and for the families of those who were killed. No pecuniary demand for National insult was made.

On the argument of the demurrers, counsel, closing the case for the Government, entered into an elaborate distinction as to the difference between the case of the *Baltimore* and the case of the *Maine*. He main-

"Second. That the public authorities of Valparaiso flagrantly failed in their duty to protect our men, and that some of the police and of the Chilean soldiers and sailors were themselves guilty of unprovoked assaults upon our sailors before and after arrest. He thinks the preponderance of the evidence and the inherent probabilities lead to the conclusion that Riggin was killed by the police or soldiers.

"Third. That he is therefore compelled to bring the case back to the position taken by this Government in the note of Mr. Wharton of October 23 last (a copy of which you will deliver with this), and to ask for a suitable apology and for some adequate reparation for the injury done to this Government.

"You will assure the Government of Chile that the President has no disposition to be exacting or to ask anything which this Government would not, under the same circumstances, freely concede. He regrets that, from the beginning, the gravity of the questions involved has not apparently been appreciated by the Government of Chile, and that an affair in which two American seamen were killed and sixteen others seriously wounded, while only one Chilean was seriously hurt, should not be distinguished from an ordinary brawl between sailors in which the provocation is wholly personal and the participation limited" (U. S. For. Rel., 1891, p. 307).

* "Mr. Foster conveys to Mr. Egan the gratification of the President at the desire of the Chilean Government, expressed in Mr. Egan's telegram of the 23d of June, and expresses the belief that **the indemnity to the relatives of the seamen killed, and to the men who survived injuries received while wearing the uniform of the United States, shall be proportionate to the gravity of the affair.** He requests information by telegram as to the views of the Chilean Government in regard to prompt compensation." (U. S. For. Rel., 1892, p. 57.)

† [From Mr. Egan to Secretary Foster.]
U. S. For. Rel., 1892, p. 64.

"Legation of the United States,
"Santiago, July 16, 1892.
No. 331. (Received August 22).

"Sir:—I have the honor to refer to my No. 326 of 12th instant and to say that on the 14th instant I communicated verbally to the minister of foreign relations the purport of your telegram of 12th instant, in regard to the offer of compensation in the *Baltimore* case, at which he expressed much pleasure. To-day I received a note from him dated 13th instant, translation of which is herewith enclosed, formally, on behalf of his Government, placing at my disposal the sum of $75,000 gold, with the request that it be distributed among the families of the two men killed and those who received personal injuries in the attack of 16th October last in Valparaiso."

tained that the United States was justified in demanding indemnity for sailors who were killed on shore leave, but that it would not have been justified in demanding indemnity had the sailors been on duty. In fact, he went so far as to say, in answer to a question propounded by claimants' counsel, that had the riot in Valparaiso occurred at the quay and that some of the men who were killed had been on shore leave and some of them had been on duty in the *Baltimore's* cutter, the United States could have demanded indemnity for those who were killed on the quay, but not for those who were killed in the cutter.* Had the occurrence actually taken place in that manner, counsel for claimants has grave doubts whether Mr. Blaine would have split hairs with such neat distinction, and can hardly conceive that he would have interpolated into the dispatch, just quoted, the words "while there on shore leave, although the United States will permit them to be killed with impunity while they are on duty."

An entirely different view of the *Baltimore* case from that of the Attorney-General was taken by President Harrison. His special message to Congress of January 25, 1892, in regard to the relations with Chile in regard to this affair completely undermines the position of the Attorney-General in regard to the distinction between men on shore leave and men on duty.† The imperative demand which was made on Chile

* During the closing argument made by Mr. Russell on behalf of the Government the following colloquy between counsel occurred; it appears on page 13 of Mr. Russell's printed argument:

"Mr. Butler. I would like to ask you this question: Whether your argument goes so far that if a cutter had taken the seamen ashore for shore leave, and after they had gotten on the dock and severed from the cutter an accident had happened in such a way that some of the men on the dock had been killed and some of the men in the cutter, do you contend that those men who were in the cutter would have had no claim for indemnity and those on the dock would have had a claim?

"Mr. Russell. If the cutter is regarded as a part of the man-of-war I answer accordingly."

† In this message (9 Richardson, 217 *et seq.*) Mr. Harrison, after alluding to the remarks in his annual message about the *Baltimore*, which have just been quoted, says: "I am still of the opinion that our sailors were assaulted, beaten, stabbed and killed not for anything they or any of them had done, but for what the Government of the United States had done or was charged with having done by its civil officers and naval commanders. If that be the true aspect of the case, the injury was to the Government of the United States, not to the poor sailors who were assaulted in a manner so brutal and so cowardly.

"Before attempting to give an outline of the facts upon which this conclusion rests I think it right to say a word or two upon the legal aspect of the case. The *Baltimore* was in the harbor of Valparaiso by virtue of that general invitation which nations are held to extend to the war vessels of other powers with which they have friendly relations. This invitation, I think, must be held ordinarily to embrace the privilege of such communication with the shore as is reasonable, necessary and proper for the comfort and convenience of the officers and men of such vessels. Captain Schley testifies that when his vessel returned to Valparaiso on September 14 the city officers, as is customary, extended the hospitalities of the city to his officers and crew. It is not claimed that every

was due to the fact that Mr. Harrison and his Cabinet considered that the men, while on shore leave, were entitled to protection from all assaults animated by local hostility to the United States, and that it was as much a national insult as if the Minister or Consul **or the flag itself** had been insulted, and was far more serious than though a mere citizen had been injured, and this Government was bound to take action upon it as though it had been an attack upon its own sovereignty.

If the views expressed by counsel for the Government in these cases had been adopted by Mr. Harrison and his Cabinet, this *National* phase of the case would have deprived the sailors themselves of all personal indemnity or compensation except such as the United States should gratuitously afford them by act of Congress out of the Treasury. In fact, the offence was declared to be equivalent to an insult to the flag, and the injury was characterized as one to the Government of the United States and not to the sailors. The demand, however, was made and collected as indemnity for the sailors for the injuries received, exactly as in the case of other citizens, and Mr. Harrison did not consider that because the case involved *National* elements, the individual sufferers could be deprived of their just claims for their indemnity; the money was paid by Chile as indemnity for the individuals;* it never went into the treasury of the United States, but was distributed by the Secretary of the Navy amongst the persons equitably entitled thereto.

The Attorney-General's position has no foundation whatever either in law or in fact, for it is a matter of history that the United States has demanded and collected indemnity for its citizens who have been killed while in discharge of their duty in exactly the same manner as they have demanded and collected such indemnity for citizens pursuing their ordinary vocations as appears from the *Baltimore* and other cases cited in this point.

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personal collision or injury in which a sailor or officer of such vessel visiting the shore may be involved raises an international question, but I am clearly of the opinion that where such sailors or officers are assaulted by a resident populace, animated by hostility to the government whose uniform these sailors and officers wear, and in resentment to acts done by their Government, not by them, their nation must take notice of the event as one involving an infraction of its rights and dignity, not in a secondary way, as where a citizen is injured and presents his claim through his own Government, but in a primary way, precisely as if its ministers or consul or the flag itself had been the object of the same character of assault.

"The officers and sailors of the *Baltimore* were in the harbor of Valparaiso under the orders of their Government, not by their own choice. They were upon the shore by the implied invitation of the Government of Chile, and with the approval of their commanding officer; and it does not distinguish their case from that of a consul that his stay is more permanent or that he holds the express invitation of the local government to justify his longer residence. Nor does it affect the question that the injury was an act of a mob. If there had been no participation by the police or military in this cruel work, and no neglect on their part to extend protection, the case would still be one, in my opinion, when its extent and character are considered, involving international rights."

* See letter from Mr. Egan to Mr. Foster of July 16, 1892, already quoted in full in the notes to this point.

The Chesapeake Sailors.

It is, of course, unnecessary to recite the details of the attack of the British man of-war *Leopard* on the United States frigate *Chesapeake* off Hampton Roads, in June, 1807. It is a part of the history of our navy and of our country.* The commanding officer of the *Leopard* claimed that certain seamen who had deserted from British vessels were on the *Chesapeake*, and he demanded their delivery. They were American citizens and the demand was refused. The *Leopard* opened fire upon the *Chesapeake*, which was unprepared for an engagement, and was obliged to surrender after a brief resistance and allow the men demanded to be taken from her. During the engagement three men on the *Chesapeake* were killed, eighteen wounded and four captured. The attack was one against the sovereignty of the United States to the last degree.† There was no personal animosity against the individual sailors; the demand for the delivery to the British man-of-war of the seamen was formally made by a naval officer of Great Britain upon a naval officer of the United States.

A demand was immediately made by the United States Government upon Great Britain,‡ and Mr. James Monroe, then Minister to England, was instructed to demand that ample reparation be made without difficulty or delay. After a great deal of diplomatic negotiation which followed this demand, Mr. Erskine, the British Minister, offered, in April, 1809, to have his Government formally disavow the act, "restore the men forcibly taken out of the *Chesapeake*," and, if acceptable to the American Government, "make a suitable provision for the unfortunate

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* For the report of the Naval Court of Inquiry on the *Leopard-Chesapeake* affair, see 3 Am. State Papers, 6, 21, 22.

† In referring to the matter President Jefferson said, 3 Am. State Papers, 24: "At length a deed, transcending all we have hitherto seen or suffered, brings the public sensibility to a serious crisis, and our forbearance to a necessary pause. A frigate of the United States, trusting to a state of peace, and leaving her harbor on a distant service, has been surprised and attacked by a British vessel of superior force, one of a squadron then lying in our waters and covering the transaction, and has been disabled from service, with the loss of a number of men killed and wounded. This enormity was not only without provocation or justifiable cause, but was committed with the avowed purpose of taking from a ship of war of the United States a part of her crew; and that no circumstances might be wanting to mark its character, it had been previously ascertained that the seamen demanded were native citizens of the United States." The foregoing is quoted from the President's proclamation of July 2, 1807, requiring British vessels to depart from the waters of the United States as the result of the *Leopard's* attack on the *Chesapeake*.

‡ See Instructions Secretary of State Madison to James Monroe, then Minister to England of July 6, 1807, 3 Am. State Papers, 183. The words used (bottom of p. 184) are almost identical with those of Secretary Sherman: "The President has the right to expect from the British Government, not only an ample reparation to the United States in this case, but that it will be decided without difficulty or delay." In case suitable reparation was not offered he was instructed to "take proper measures for hastening home."

sufferers."* No question whatever was raised by either government as to the right of the Government of the United States to demand indemnity for sailors killed while they were on duty, defending their vessel against an unwarranted attack by the war vessel of a power at peace with the United States. Nor was the point, so persistently argued by the Attorney-General, as to the sailors simply being an integral part of the ship equipment and crew, and therefore not entitled to personal indemnity, ever suggested by either government.

The United States accepted this offer,† but the British Government disavowed it. In November, 1811, however, the British Government authorized its minister at Washington to renew the offer, including "a suitable pecuniary provision for the sufferers in consequence of the attack on the *Chesapeake*, including the families of the seamen who unfortunately fell in the action."‡ This proposition was accepted by the United States.§

The correspondence, a part of which is printed in the notes to this section, shows that the United States, even in its days of infancy, did not hesitate to demand indemnity for its sailors when they were wrongfully killed or injured, although the deaths and injuries were the result of a direct attack upon its sovereignty, as it necessarily was when one of its own war vessels was fired upon by the war vessel of another power; in fact, the attack was of such a nature as to justify its being referred to in the diplomatic correspondence as a naval engagement.

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* Mr. Erskine to Mr. Smith, April 17, 1809, and April 8, 1809, 3 Am. State Papers, 295, 297.

† Mr. Smith to Mr. Erskine, April 17, 1809, 3 Am. State Papers, 296.

‡ Mr. Foster (British Minister) to Mr. Monroe (Secretary of State): "Washington, Nov. 1, 1811. * * * (The propositions were as follows):

"First. That I am instructed to repeat to the American Government the prompt disavowal made by His Majesty (and recited in Mr. Erskine's note of April 17, 1809, to Mr. Smith), on being apprized of the unauthorized act of the officer in command of his naval forces on the coast of America, whose recall from a highly important and honorable command immediately ensued, as a mark of His Majesty's disapprobation.

"Secondly. That I am authorized to offer, in addition to that disavowal on the part of His Royal Highness the immediate restoration, as far as circumstances will admit, of the men, who in consequence of Admiral Berkeley's orders were forcibly taken out of the *Chesapeake*, to the vessel from which they were taken, or, if that ship should no longer be in commission, to such seaport of the United States as the American Government may name for the purpose.

"Thirdly. That I am also authorized to offer to the American Government a suitable pecuniary provision for the sufferers in consequence of the attack on the *Cheasapeake*, including the families of those seamen who unfortunately fell in the action and of the wounded survivors." 3 Am. State Papers, 499, 500.

§ Mr. Monroe to Mr. Foster, November 12, 1811, 3 Am. State Papers, 500.

The General Armstrong.

When, in direct violation of neutral rights, the British fleet attacked the privateer brig *General Armstrong*,* in Fayal harbor, in 1814, during the war of 1812, and Portugal refused the protection due to the ships of friendly nations in her neutral ports, Congress voted $10,000 as prize money to the privateersmen whose gallant conduct had proved so efficacious at a critical moment to this country; that did not interfere, however, with the State Department pressing a claim against Portugal for the owners of the vessel and for the sailors who were killed, until at last, even after arbitration, unfortunately decided (upon papers improperly submitted) against us, Congress still indemnified the owners of the vessel **and the crew** for the losses which they had sustained, and which were in their nature claims against a foreign government. Although these men were not actually enlisted officers of the United States they were privateersmen, and as such fought under the Stars and Stripes and received prize money from Congress.

The Wyoming.

When, in 1863, an attack was made upon naval vessels of the United States and of other powers in the Japanese waters, and in the Straits of Shimonoseki, Japan was obliged not only to render an apology but also to pay indemnities to the French, Dutch, British and United States Governments aggregating $3,000,000; subsequently, Japan having fully atoned for the offense, the United States returned its share of that indemnity, following the long-established precedent of this country that it would not accept a money indemnity for an insult to the flag; this Government, however, deducted $1-10,000 from the indemnity received to represent the expenses actually incurred by the Government and also as compensation and indemnity for the sailors and marines of the *Wyoming*, who were attacked, and some of whom were killed on that occasion.†

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* For full account of the *General Armstrong* case see 2 Moore's Arbitration, pp. 1071 *et seq*, and see also p. 51, *ante*, of this brief. The *General Armstrong* was not a regular naval vessel belonging to the United States; it was, however, a duly commissioned privateer sailing under letters of marque, and the fact that Congress voted prize money to the crew shows that the men occupied a *quasi*-naval position. See Act of 1834, 6 U. S. Stat. at L., 603; Sen. Doc. 231, 56th Cong., 2d Sess., Part. 1., for numerous reports in regard to this case; Act of 1882, 22 U. S. St. at L., 697; Act of 1895, § 1, 28 U. S. St. at L., 843.

† Counsel for the Government have relied upon the fact that in distributing the *Wyoming* indemnity among the crew Congress ordered it to be done *as* prize money. That is, the distribution was made on the basis of prize money. The point on which the claimants cite the *Wyoming* is that the United States received from Japan two separate funds—one for $750,000 to atone for the *insult*, which was refunded in full, the other for $140,000, which was received for *indemnity for expenses and for the crew. This was retained*, and the distribution to the crew, although it was made under an act of Congress for gallant conduct and on the basis of prize money, was, as a matter of fact, made out of moneys received from Japan as an indemnity for an act which was committed during a period of peace, but for which it was responsible. That the distribution of the *Wyoming*

The Water Witch.

In 1855 the Government of the United States sent out a naval vessel called the *Water Witch*, under the command of Lieutenant Thomas J. Page, to make a survey of the tributaries of the Rio de la Plata and the Paraguay Rivers. The Brazilian Government gave its consent to the expedition so far as waters controlled by it were concerned, but the vessel went up the Parana River, and proceeded a few miles above the point where it forms the common boundary between Paraguay and Argentina. At that time Lieutenant Jeffers, who was then in command of the *Water Witch*, perceived that the Paraguayans were getting guns ready apparently for an attack; he thereupon cleared his vessel for action also. A Paraguayan canoe came alongside and a man handed Lieutenant Jeffers a paper written in Spanish, which he declined to receive. Thereupon he stood up the river with his crew at quarters. Two blank cartridges were fired by the fort in quick succession, and these were followed by a shot which carried away the wheel of the vessel, cut the ropes and mortally wounded the helmsman. On receiving this fire Lieutenant Jeffers directed a general fire in return. The action continued for some minutes. It seems that the Paraguayan Government had forbidden foreign men-of-war to enter the waters within its jurisdiction. This fact was admitted, but Lieutenant Page claimed that as the river was a common boundary between the Argentine Confederation and Paraguay he had a right to go up the main channel of the river, although it was on the Paraguayan side. A great deal of correspondence ensued in regard to this matter, and the Paraguayan Government regarded the attempt of the Lieutenant in charge of the *Water Witch* to force his way up the river as an outrage, and in this respect they have been sustained by a writer on international law of no less authority than M. Calvo, the eminent Brazilian, but whose sympathies, of course, were with the South American countries.

Notwithstanding the fact that the man at the wheel of the *Water Witch* was doing his duty on an occasion in which actual hostilities occurred, the United States demanded $10,000 indemnity for his family, and subsequently that amount was paid by the Government of Paraguay and turned over to the family of the injured seaman. Counsel for the Government in their brief have erred in saying that this matter was found by an arbitration committee to be without foundation, as the Hopkins claim, and not the *Water Witch* claim, was submitted to arbitration, and the Paraguayan Government, at the same time that it re-

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fund was placed by the Senate Committee on Foreign Relations not on the grounds of gratuity but on those of justice, appears from report No. 120, 57th Congress, 2d Session, July 7, 1882 (Doc. 231, p. 440) in which on page 453 it is said that justice and equity require that Congress should recognize the claims of the crew. "Their claim is based upon the convention by which they were intended to be provided for, upon the fact that $140,000 was set apart for them by the other contracting parties and paid to the United States in virtual trust for them."

ferred the Hopkins claim to arbitration, voluntarily paid the indemnity for the sailor of the *Water Witch*.*

The Huesken Case.

In January, 1861, Mr. Huesken, the interpreter to the Japanese Legation, was assaulted and killed; the United States at once demanded punishment of the offenders, an apology for the offence and an indemnity for the widowed mother of Mr. Huesken, all of which was accorded, and the sum of $10,000 was paid by the Japanese Government and transmitted to Mrs. Huesken.†

The Spanish Consuls in New Orleans and Key West.

In all the cases just cited the United States demanded and collected indemnity from foreign powers; it has also *paid* indemnity under similar circumstances.

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*A full account of the *Water Witch* and *Hopkins* cases, and the relations of the United States with Paraguay arising therefrom will be found in Chapter 22, 2 Moore International Law, pp. 1485 *et seq.*; and see the report of the Secretary of the Navy, December 2, 1859.

† See message and diplomatic correspondence for 1862, pp. 804–807.

In a letter of Mr. Harris to Mr. Seward, November 23, 1861, he says: "In your dispatch of August 1 (No. 18) you informed me that you urgently insist, except that, in the extremest necessity, I shall not consent to any postponement of any covenant in the existing treaty without first receiving satisfaction of some marked kind for the great crime of the assassination of Mr. Huesken while in the diplomatic service of the United States. You leave me to determine on the form and mode of that satisfaction, adding that it would be best to secure, if possible the punishment of the assassins; but circumstances unknown to you must enter into the question, and may modify my action, but deem the principle too important to be abandoned. After reflection, it appears to me that the satisfaction required might be given in either of the three following forms, viz.: 1. By the arrest and punishment of the assassin; 2, by a salute to our flag; or, 3, by a money payment as an indemnity." The serious question of receiving a money indemnity as "selling the blood" was referred to at a subsequent point in this letter,

On November 27th Mr. Harris wrote to Mr. Seward that the Japanese Government would pay an indemnity and that no effort should be wanting to punish the offenders, in regard to which he said:

"I replied that Mr. Huesken was the only child of his widowed mother, who, by his death, had been deprived of her sole means of support. I would therefore propose that they should pay her a sum sufficient for her support, either in annual payments or in a sum sufficient to purchase a life annuity equal in amount to the income she received from her late son. I stated, very emphatically, that they must not consider this a proposition from me to sell the blood of Mr. Huesken, or that the payment of any sum of money could atone for his murder.

"After a few explanations had been asked and given the ministers promptly agreed to pay me the sum of $10,000 for the benefit of Mrs. Huesken. They then stated that they did not consider that the payment of this sum in any way released them from their obligation to bring to punishment the murderers of Mr. Huesken."

These extracts have been quoted at length in order to show that while Mr. Huesken was in the diplomatic service of the United States, and this country was dealing with the other questions in connection with the opening of our intercourse with Japan, they did not hesitate to demand personal indemnity, although the act was committed directly against the sovereignty of the United States and was an exhibition of the animosity of the Japanese people against foreigners, and especially against the United States.

In 1851, when the news of the summary execution in Cuba of Crittenden and other members of the Lopez expedition reached New Orleans and Key West, there were strong anti-Spanish riots in both cities, in the course of which Spanish citizens were assaulted and their property destroyed. Among those who suffered injury were the Spanish consuls, and a reclamation was made upon this Government on their behalf through the Spanish Minister. A long correspondence ensued in regard to this matter, which finally resulted in the United States indemnifying the consuls for the loss and indignity which they had sustained.*

A full account of this matter can be found in Wharton's Digest, and it is cited to show that the United States did not take the position when a demand was made upon it that consuls should not be indemnified because they occupied an official position under their Government. In fact, the correspondence shows that the proper authorities of the United States considered that there was a special obligation to indemnify the consuls beyond that which existed in regard to any other Spanish citizens. It is undoubtedly to these cases that Mr. Blaine referred in his instructions to Mr. Egan when he declared that the United States had recognized the principle that no self-respecting Government would permit its representatives, either civil or military, to be beaten and killed in a foreign country without demanding suitable reparation.†

The Margery Case.

In 1875 Mr. Margery, an English officer and five Chinaman accompanying him on an exploring mission from British Burmah, were killed by native soldiers and the British Minister at once demanded that the British Government should be allowed to renew the expedition and that an indemnity of 150,000 taels should be paid, of which 30,000 taels was to go to Margery's family. In this case, Mr. Avery, United States Minister, united with the British Minister (as did also some of the other foreign ministers) in demanding that the Chinese Government pay this indemnity for the death of a British officer.‡

The British Sailors in Japan.

In 1862 British sailors on duty at the Brit sh Legation at Yedo were killed in a manner for which the Japanese Government was responsible, and on the failure of that Government to properly meet the demand which was made upon them, Earl Russell, then in charge of the British Foreign office, directed a peremptory demand to be made to the Japanese

* For a full account of these occurrences see 2 Wharton, § 226, p. 601.

† See extracts from Mr. Blaine's instructions of January 2, 1892, on p. 53, *ante*, of this brief.

‡ Letter of Mr. Avery to Mr. Fish from Pekin, April 1, 1875, U. S. For. Rel., 1875, pp. 310 *et seq.*

Government, "which was not to be modified, delayed or even discussed," but to be met within twenty days.*

The French Corvette Dupleix.

On March 8, 1868, while the French frigate *Venus* and French corvette *Dupleix* were in the port of Sakai, Japan, a number of Japanese armed men attacked the steam launch of the *Dupleix* at a landing, eleven men, including the midshipman in charge of the launch, were killed, four were wounded and one escaped unhurt. No damage was done to the ship, the launch or other national property of France. The attack was disavowed by Japanese authorities, but the French Government through the French Minister at once made a demand on the Mikado, which included the execution of all those who had participated in the attack, an apology to be made on the *Venus* by two princes, one of the blood and one of the province, and "an indemnity of $150,000 to be paid on behalf of the Damio of Tosa to the French Government, the interest on the fund to be applied towards the support of the families of the officers and the men who were murdered." These demands were acceded to and the indemnity was paid in three installments of $50,000 each.

The fact that the victims of this outrage were an officer and sailors of the French Navy, who were actually on duty in a naval vessel when they were killed, and the attack resulted from the hostile feeling against foreigners, makes it almost identical with the *Maine* case, and peculiarly applicable thereto as a precedent for demanding indemnity for the families of the sailors as well as insisting upon suitable apology for the insult to the flag.†

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* Letter from Mr. Pruyn to Mr. Seward, from Legation of the United States in Japan, Yedo, April 10, 1863:

"SIR: I have the honor to inform you that Lieutenant-Colonel Neale, her Britannic Majesty's charge d'affaires, read me a communication a few days since, while I was on a short visit to Yokohama, which he was about sending to the Japanese Government, agreeably to the instructions of Earl Russell, in which he makes a peremptory demand on this Government, 'which is not to be modified, delayed or even discussed,' but to be met within twenty days of the 6th inst.

"For the murder of the British sailors in June last at the British Legation, the sum of £10,000 is again demanded; for the murder of Mr. Richardson and the wounding of his companions on the tokaido in September last, an apology is demanded from this Government, and also the payment of £100,000 sterling.

"At the same time a frigate is to be sent to the territory of the Prince of Satsuma (about sixty miles from Nagasaki) with a demand for the payment by him of the sum of £25,000, and that the chief murderers of Mr. Richardson shall be executed in the presence of a British officer.

"A British fleet of twelve ships of war, under command of Rear-Admiral Kuper, is to enforce this demand; the measures to be adopted are not yet determined on, but a blockade, or some other measures short of hostilities, is first to be resorted to." (U. S. Diplomatic Correspondence, 1863, Part II., p. 989.)

† A full account of this affair will be found in Diplomatic Correspondence of the United States for 1868, Part I., from pages 698–808; see index of that volume for the particular dispatches which refer to this incident.

SEVENTEENTH.—The fact that the deaths and injuries which are the basis of the claims occurred and were received on a battleship of the United States Navy, does not in any way relieve Spain from responsibility therefor, and the doctrine of exterritorialty applicable to jurisdiction of the sovereign owning a war vessel over such vessel in a friendly harbor does not in any way relieve the sovereign of the port from the necessity of protecting such vessel or of responsibility in case of failure to afford such protection.

It was with some surprise that the counsel for the claimants heard the counsel for the United States who opened and closed the argument for the Government declare that the fact that the injuries for which the petitioners have filed their claims, were not received within the jurisdiction of Spain, and therefore Spain was not liable therefor to the United States or to the petitioners; but that the fact that the deaths and injuries occurred and were sustained on a United States battleship transferred the territorial location of the tort committed from Spanish to United States territory. Still more surprised were the counsel for the claimants when they heard United States counsel, in order to relieve their Government from the payment of a comparatively small amount of money, solemnly invoke before this Court those principles of exterritoriality applicable to the preservation of jurisdiction of the United States over its own warships wherever they may be, for the purpose of relieving the sovereign of the foreign port which such vessels might visit, from liability for deaths of, and injuries to, the officers and crew of such vessel resulting from the wanton destruction thereof.

There is no rule of international law which it is more important for the United States to preserve than that which places the burden of the protection of American war vessels upon the sovereign of the port wherever it may be, notwithstanding the rules of exterritoriality as to jurisdiction thereon; this thought must have been uppermost in the mind of Secretary Sherman when he penned the instructions of March 26th, 1898, which is cited under another point,* in which he claimed the jurisdiction over the vessel for the United States but charged the Spanish Government with the protection thereof while in the harbor of Havana.

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* See note under Nineteenth Point on p. 75, *post*, of this brief.

The entire amount of the claims which have been filed with this tribunal on account of the destruction of the *Maine* equals about one-half the average value of the battleships of the United States Navy, and therefore the necessity of maintaining the rule of co-existent exterritorial jurisdiction and local protection is infinitely more important for the United States than it is to defeat these claims. Notwithstanding the immense amount, as well as the principle, which is at stake, counsel for the Government in these cases have enunciated as a principle of law that when vessels of the United States are in foreign harbors the State in whose water they float is exempt from care or liability pertaining to their management and control.

This may be true as to what happens *on* the vessel, but the Attorney-General extends the exemption to relieving the local sovereign from affording any protection *to* the ship itself, and if his position in this respect is sustained it will oblige every vessel of the United States Navy when it enters a foreign port to protect itself and to guard against disasters similar to that which happened to the *Maine*, and furthermore it will shift from the sovereign of the port to the United States not only the burden of protection, but also the burden of proving the cause of any disaster which might happen to the vessel.

In order that there may be no question as to the position of the Attorney-General in this respect, his point is quoted, and the italics in the quotation are his own.*

The propositions of the Attorneys-General in this respect are so monstrous that it is practically impossible to refute them. It is the first time that the doctrine of exterritoriality, which has been enunciated, sustained and expanded solely for the purpose of affording protection to the vessels of one sovereign power in the territory of another,

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* "It is submitted that no individual claim for indemnity against Spain arose out of the explosion of the *Maine* under the circumstances; and that if any claim originated from that occurrence it was a national claim. And this results from the peculiar situation. As a public vessel of the United States, the *Maine*, although at the time of its destruction was physically within the territorial waters of Spain, yet she was not within the jurisdiction of Spain. Public vessels of a State passing through or anchoring in foreign waters enjoy an exemption from territorial jurisdiction under a well-recognized principle of international law. In these circumstances they enjoy absolute immunity from the exercise of jurisdiction by the local authorities. They are considered, as it were, projections of foreign territory, subject only to the jurisdiction of the flags they bear. *As they are exempt from local jurisdiction, the State in whose waters they float is correspondingly exempt from any care or liability pertaining to their management and control.*
* * *

"From the principle of immunity of ships of war in foreign waters from local jurisdiction, certain material consequences result, some of which are convenient and advantageous to the ship, its crew, and equipment; others which perhaps may, on occasions, be inconvenient and burdensome. These consequences, however, do not affect or modify the rule of international usage in this regard. As in many other situations which are familiar in law and custom, the maxim applies, *Qui sentit commodum entire debet et onus:* He who derives the advantage ought to sustain the burden."

has been distorted into a general license to destroy ships and men with impunity; and, if it were not for the fact that able counsel devoted at least two hours to maintain these propositions, it would be passed over with a mere mention in this brief; inasmuch, however, as the proposition was seriously presented to, and argued before, this tribunal it will be necessary to make some reference to the general doctrine of exterritoriality and to the particular elements of such doctrine which were applicable to the *Maine* at the time she was destroyed in Havana harbor.

Fortunately for Court, for counsel and for claimants, the position of the United States in this regard was definitely, clearly and concisely set forth within a few weeks after the occurrence, and the extract from Secretary Sherman's instructions of March 26 to Minister Woodford, which is quoted under another point is the enunciation of the proper department of the Government of the United States upon this subject, and should certainly be adopted by this Court, not only because it was such an enunciation, but because it was a correct statement of the situation.

On March 26th Secretary Sherman, in transmitting to him a cable summary of the report of the Naval Court of Inquiry, directed Minister Woodford to communicate to the Spanish Government that the *Maine* had entered the harbor of Havana, relying upon the security and protection of a friendly port, and that while she remained *as to what took place on board under the jurisdiction of her own government, the control of the harbor remained in the Spanish Government, which as the sovereign of the place was bound to render protection to persons and property there, and especially to the public ship and the sailors of a friendly power.**

Secretary Sherman summed the whole case up in that paragraph. The United States retained jurisdiction, but the Spanish Government was bound to afford protection.

The Attorney-General's proposition practically means that the burden of protection of, as well as jurisdiction over, a battleship of the United States Navy in a friendly port, devolves upon the United States; if this is sustained it would practically relieve every foreign nation from affording that degree of protection to American vessels, which, under the rules of international law, they always have been, and now are, obliged to afford, and which the United States always affords, actively, and not passively, to the warships of other friendly nations within its ports.†

* See extracts from Secretary Sherman's instructions to Minister Woodford on p. 77, *post*, of this brief.

† When the Spanish warship *Viscaya* visited New York in February, 1898, every possible precaution was taken to insure its safety. Police and revenue cutters guarded it night and day, and persons without authority were not permitted to approach within a certain distance of it. The correspondence in regard to the exchange of visits of the Spanish and American war vessels is referred to in U. S. For. Rel., 1898, under Spain; see sub-head Battleship *Maine*.

The doctrine of exterritoriality applies equally to ships of war and to the residences of foreign ambassadors and foreign ministers.*

In neither case does the local jurisdiction extend over the ship, the embassy or the legation, but the local sovereign is bound to protect the ship and the residence, and also the people thereon and therein.

Vattel declares that the "independency of the ambassador would be very imperfect, and his security very precarious, if the house in which he lives were not to enjoy perfect immunity and to be inaccessible to the ordinary officers of justice." But as to protection he says: "The house of an ambassador ought to be safe from all outrage, being under the particular protection of the law of nations and that of the country; to insult it is a crime both against the State and against all other nations"† The statement of the law in Secretary Sherman's letter to Minister Woodford, which has already been cited, is almost a paraphrase of Vattel's position as to immunity from local jurisdiction and the co-existing right to rely upon the protection of the local sovereign.

Lieutenant-Colonel and Deputy Judge Advocate George B. Davis, formerly Professor of Law at the Military Academy at West Point, is one of the ablest authorities on international law in the United States. The second edition of his "Elements of International Law," originally published in 1887, appeared in 1900, and in his chapter devoted to the principles of exterritoriality he practically argues this case for the claimants and distinctly sustains their position as to the degree of protection to be accorded by the sovereign of a port to the war vessels of a friendly power which may be therein on a mission of peace.

In support of the principle that while the sovereignty of the owner of the vessel continues thereover, the sovereign owner of the port must render protection, he cites the case of *The Exchange*,‡ and thereafter proceeds to give instances in which the questions of exterritoriality have been involved. He refers to the case of the *Sitka*, a Russian ves-

* Wheaton, in enumerating the instances in which the municipal institutions of a State may operate beyond the limits of its territorial jurisdiction, specifies:

"(1) person of the sovereign; (2) the person of the ambassador and his residence; (3) the foreign army or fleet marching through, sailing over or stationed in the territory of another State, and in the absence of any express prohibition the ports of a friendly State are considered as open to the public, armed and commissioned ships belonging to another nation with whom that State is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under the license implied from the absence of any prohibition or under an express permission stipulated by treaty" (Dana's 8th Edition, 1866, Part 2, Sec. 95, page 153).

In elaborating upon this, he says: "If there shall be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and remain in them, while allowed to remain, under the protection of the Government of the place" (*Id.*, § 100, p. 159).

† Vattel, Bk. 4, Ch. 9, § 117.

‡ *Schooner Exchange* vs. *McFadden*, U. S. Sup. Ct., 18; 7 Cranch, 103, MARSHALL, *Ct. J.*

sel, which brought a prize into the port of California, and the captain of which refused to recognize process issued by the United States, and was sustained therein by the Attorney-General; he also cites under the same head the cases of the *Baltimore*, the *Constitution*,* and the *Maine*.

Professor Davis published his last edition before any claims had been filed on behalf of sufferers of the *Maine*. He has occupied a position of great importance under the United States, that of instructing the men who were to be the officers in its army, and who necessarily should possess a complete knowledge of the practical relations of the United States with foreign countries; it cannot be presumed that he would improperly impute to a foreign nation lack of care and protection, or charge it with any greater degree of care and protection than the principles of international law actually require. His opinion, therefore, in regard to the responsibility of the Spanish Government for the destruction of the *Maine* is entitled to be received with great weight by this Commission, and as he covers in his brief review of the case both the question of degree of authority retained thereover by the United States and the degree of protection to be accorded thereto by Spain, his summary will be quoted in full in the notes as it sustains in every respect the claimants' position that, as he expresses it:

"The privilege of exterritoriality is admitted to extend only to the officers and crews of public armed vessels, and goes no further than to exempt the vessel and crew from the operations of the local laws. It confers no authority upon the officers of the visiting vessel to resort to measures of defence, or of precautionary police, outside the ship, or within the territorial waters of the State in whose harbor it is anchored; for such protection from purely external injury the ship must rely upon the efforts of the local authorities, whose duty and responsibility it is to resort to such measures of precaution as are suggested by the emergency of the occasion," and that—

"If, in view of the local situation, or in consequence of its strained relations with the Government of the United States, the Spanish Government was either unable or unwilling to charge itself with the safety and security of the Maine, it should have withheld its consent to the entry of the vessel into its territorial waters; failing to do this, that government was justly held responsible for the disaster which ensued upon its failure to exercise the diligence which was demanded by the circumstances of the case."†

* In this case the Admiralty Courts of Great Britain refused to take jurisdiction of a salvage case against a vessel belonging to the U. S. Navy.

† "*Case of the* "*Maine.*" The United States battleship *Maine* entered the harbor of Havana, Cuba, on January 25, 1898. Immediately upon her arrival, the customary civilities were exchanged and the vessel was conducted, by a government pilot, to the anchorage assigned her, as a foreign vessel of war, by the local naval authorities. Here the ship remained at anchor for a period of about three weeks. During that time it does not appear that any special measures of precaution were resorted to by the Spanish Government with a view to insure the safety of the visiting vessel. At 9.40 P. M., on

EIGHTEENTH.—Article VII. of the Treaty of 1898 relinquished claims of every kind, and this included claims whether the same had been presented by the Government of the United States to that of Spain or not.

Counsel for the Government have endeavored to limit the use of the word "claims" as used in Article VII. of the treaty of 1898 to the de-

February 15th, being at the time moored to the buoy assigned her upon her arrival, the *Maine* was destroyed by the explosion of a submarine mine which caused the incidental explosion of one or more of her forward magazines. A naval court of inquiry was immediately convened by order of the United States Government, which, after a careful and exhaustive investigation of the circumstances, reached the opinion that the destruction of the vessel was caused by the explosion of a mine exterior to the ship, and was not due to the fault or negligence of her officers and crew. An inquiry instituted by the Spanish Government, after a less complete investigation, is believed to have reached a different conclusion; but the position of certain parts of the ship's structure, in consequence of the explosion, including portions of the keel, the outer shell, and the outside bottom plating, were such as to offer conclusive proof that the destruction was due to an exterior explosion. By whom and under what circumstances the destruction was caused has never been determined. It is proper to say, however, that the act was promptly disclaimed by the local colonial authorities, and it has never been authoritatively suggested that the injury was ordered, or authorized, or even countenanced, by any branch or portion of the governmental authority of Spain.

"Although the relations existing between the governments of the United States and Spain were strained at the time of the occurrence, the circumstances attending the entry of the vessel were by no means unusual, and the visit was not made until a conference had been had with the Spanish minister in Washington, in which the renewal of the visits of public armed vessels of the United States to Spanish waters had been discussed and accepted, and the governmental authorities at Madrid and Havana had been advised of the purpose of the United States Government to resume friendly naval visits at Cuban ports, and that in that view the *Maine* would forthwith call at the port of Havana.

"The case is novel at international law in that it gives rise to a question as to the nature and extent of the responsibility incurred by a state which, under the circumstances above set forth, permits a foreign vessel of war to enter its territorial waters. The rule of international law applying to the case is believed to be correctly stated by Chief Justice Marshall in the case of the *Exchange* in the following terms: 'Unless closed by local law, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them, while allowed to remain, under the protection of the government of the place.' [Then follows the first quotation in the text.]

"Where independent nations are concerned, the degree of care to be shown by one State in order to prevent injury to another, where such duty of prevention exists, is perhaps best described by the term 'due diligence'; this means something more than, and different from, 'reasonable care,' as that term is used in describing the corresponding obligation owed by one individual to another, or to the public, and implies that the diligence used in the prevention of injury must be proportioned to the risk of such injury occurring to the vessel of a friendly nation which may happen to enter its ports or territorial waters. The duty of protection, and the expediency of resorting to special precautionary measures, upon the occasion of a public armed vessel entering even

mands of citizens of the United States against Spain which had been presented by the United States to Spain prior to the execution of the treaty. This is utterly untenable, because the relinquishment clause was made as wide as possible. It included "all claims for indemnity, national and individual, of every kind,"* and that necessarily includes all claims and demands whether presented or not. In fact, the fallacy of the Government's position is clearly demonstrated by the fact that the relinquishment included claims that "may have arisen since the beginning of the late insurrection in Cuba and prior to the **exchange of ratifications** of the present treaty." It was manifestly impossible to have meant presented claims when the words "*may have arisen*" were used as to claims prior to the signature of the treaty, and the relinquishment included claims which might possibly have arisen in the future period of indefinite length which necessarily ensued before the treaty could be ratified by the Senate and the ratifications formally exchanged, an event which did not actually occur until four months thereafter.

Counsel making the closing argument for the Government denied that rights of citizens for indemnity were claims within the meaning of the relinquishment clause of the treaty until taken up by the United States Government and presented against Spain directly or by a sample case, or by implication.†

The definition of the word "claims" is too well known to require any elaborate argument on the part of the claimants to refute the Government's proposition. The relinquishment was of claims of every kind, the assumption or agreement to adjudicate and settle related to every claim relinquished, the jurisdiction of this Court extends over all claims assumed. That is, the relinquishment clause as against Spain, the assumption clause as against the United States, and the clause conferring jurisdiction on this Court are all co-extensive, each with the other, and no hair-splitting distinctions can deprive a citizen having a just claim

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a friendly harbor, are suggested by the fact that the crew are not only strangers to the port, but are members of a different nationality, and thus occupy a very different relation from that of ordinary aliens; in the case of the *Maine*, a resort to such preventive measures was not only sanctioned by the rules of international law, but required by express treaty stipulations, and strongly suggested by the strained relations existing between the United States and Spain." [The article concludes with the second quotation in the text.] (The Elements of International Law. By George B. Davis, New and Revised Edition, 1900, pp. 77–80.)

* For Article VII. in full, see note on p. 2, *ante*, of this brief.

† The following colloquy occurred during the closing argument as appears from the printed argument of Mr. Russell (pp. 35, 36):

Mr. CHANDLER. Well, this section [Art. VII. of the Treaty] includes individual claims of every kind.

Mr. RUSSELL. There may be a right and no claim, a claim and no right.

Mr. CHANDLER. Tell us what the rights are that are not claims.

Mr. RUSSELL. The rights that are not claims are the rights that have not been turned into claims and made by the Government in some way, by implication or otherwise.

against Spain, no matter in what condition it was on December 10th, 1898, from having the same adjudicated by this Court and the United States Government charged therewith.

The claimants do not consider that there is any basis whatever to the Government's contention that it can avoid payment of just claims of its citizens because it failed to properly present them or include them specifically in the relinquishment; they do claim that the *Maine* claims had been presented not only by implication which, Mr. Russell admits would be sufficient, but directly, to the Spanish Government, and reparation had been demanded therefor, and this will be demonstrated by extracts from the correspondence between the executive department of the Government and the Spanish Government, which are quoted in the next point.* In this point, however, it will be shown that even if the *Maine* claims had never been formally, or even by implication, accepted by the United States and presented to Spain, they would still be, as they undoubtedly are, included in the relinquishment, assumption and jurisdictional clauses of the treaty, and the act creating this commission.

This Court will remember that the secretary and counsel of the American Commissioners in Paris was Mr. John Bassett Moore, whose knowledge of the form of and terms used in claims conventions probably exceeds that of any other person. Not only every claims convention made by the United States, but many made by foreign powers between each other for the purpose of releasing claims have been carefully studied and commented upon by him in his great work on international arbitration. The general presumption, therefore, that plenipotentiaries mean what they say and say what they mean in mutually releasing their respective Governments from claims national and individual of every kind is strengthened by the fact that in this particular instance the protocols show that the exact wording of the articles was left to the Secretaries-General,† one of whom was Mr. Moore, who could not possibly have used words which were not intended to exactly express the extent of the mutual releases.

Notwithstanding the elaborate argument made by the counsel closing the case for the Government, it has been well established that claims which had not been formally presented by the asking Government on behalf of its citizens to the Government upon whom the demand is made, are not excluded from the releases contained in claims conventions, or from the jurisdiction of a tribunal to which claims are referred for arbitration.

The case of *Aspinwall* vs. *Venezuela* has already been referred to at some length, in which it was decided that claims *ex contractu* could be considered by an arbitration tribunal created by the Convention between

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* See page 75 *et seq.*, *post*, of this brief.

† See Doc. No. 62, Treaty with Spain, Protocol No. 19, p. 230.

the United States and Venezuela of 1889, although it was contended that the correspondence related solely to claims arising *ex delictu*.*

The commissioner who wrote the opinion in that case collected numerous definitions of the word "claims," which include not only demands, but the right to claim or demand; the matter is summed up by the expression: "Claim is the generic term implied in the legislation of the United States to express every form and character of demand that one can urge against another," and the opinion adds that it would seem quite superfluous to cite particular statutes or authorities on this subject.†

Had it been intended, however, by the plenipotentiaries in Paris to exclude either from the relinquishment or the assumption clauses of Article VII. claims which up to that time had been presented, the same form would have been used to express their intention as has customarily been used in claims conventions which have been confined to a specific class of claims.‡ and the fact that Mr. Moore had all of these treaties before him at the time is sufficient evidence that the intention of the

* See pp. 13 *et seq.*, *ante*, this brief.

† Moore's International Arbitration, pp. 1622 *et seq.*

‡ The convention for the settlement of claims with Peru of 1863 (5 Moore's International Arbitration, 4786) provides that all claims not yet settled between the two Governments, "and statement of which, soliciting the interposition of either Government, may, previously to the exchange of the ratification of this convention, have been filed in the Department of State at Washington or the Department of Foreign Affairs at Lima, shall be referred to a mixed commission," &c.

The convention for the settlement of claims with Peru of 1869 (5 Moore's International Arbitration, 1787) provides that all claims, &c. "which may have been presented to either Government for its interposition since the sittings of the said mixed commission, and which remain yet unsettled, as well as any other claims which may be presented within the time specified in Article III. hereinafter, shall be referred," &c.

The convention for the settlement of claims with American citizens made with Portugal in 1851 (5 Moore's International Arbitration, 4791) provides that "the indemnities which Portugal promises to pay, or cause to be paid, for all the claims presented previous to the 6th day of July, 1850, on behalf of American citizens, by the Government of the United States (with the exception of that of the *General Armstrong*) are fixed at $91,727," &c.

The convention for the settlement of claims with Venezuela of 1867 (5 Moore's International Arbitration, 4808) provides that "all claims on the part of corporations, companies or individuals, citizens of the United States, upon the Government of Venezuela, and which may have been presented to their Government, or to its legation at Caracas, shall be submitted," &c.

The claims convention with Venezuela of 1889 (5 Moore's International Arbitration, p. 4810) provides that "all claims, &c., which may have been presented to their Government, or to its legation at Caracas, before the first day of August, 1868, and which by the terms of the aforesaid convention of April 25th, 1866, were proper to be presented to the mixed commission organized under said convention shall be submitted," &c.

The convention with Mexico for the adjustment of claims of 1839 (5 Moore's International Arbitration, p. 4771) provided that "all claims of citizens of the United States upon the Mexican Government, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State or to

American Commissioners was to cover every possible right or claim of every kind which either had been, or could be, urged by one government against the other. The correspondence between the State Department and the Spanish Government, through Minister Woodford, and the subsequent correspondence prior to the declaration of war; the letter of Secretary Day to the Duke D'Almodovar del Rio, of July 30th, 1898; and the correspondence between Mr. Day, as President of the American Commissioners in Paris, and M. Rios, one of the Spanish Commission, are all set forth at length under the next point,* and will not be referred to at length here, except to say that the correspondence before the war contained a direct charge that Spain had failed to afford proper protection to our ships and sailors while under her protection in Havana Harbor, and that the United States expected Spain to make the reparation therefor that the government of one civilized nation should make to another under such circumstances, and that the letters of Secretary Day referred to claims of our citizens for injuries to person and property, and that therefore the demand was complete and the claims could be considered as presented; that correspondence is referred to under this point simply to show that it was the intention of the Commissioners, both American and Spanish, to so mutually release each Government from claims of the other, both national and on account of its citizens, that no claim could ever be made after the ratification of this treaty by one Government upon the other for any cause whatsoever which was based upon a matter happening prior to the exchange of the ratifications. If the ingenious argument of the counsel for the Government is correct, and the relinquishment clause does not cover what he calls abstract rights or unpresented claims, then the United States is in the position of not having been released by Spain from claims which had not been presented to the United States, and Spain is not released from such "abstract rights" of United States citizens as their Government may now see fit to take up and present to Spain *de novo* and demand additional indemnity to that already received, and which Spain was certainly justified in believing was in full for all possible

the diplomatic agent of the United States at Mexico *until the signature of this convention* shall be referred," &c.

The convention with Mexico for the settlement of claims of 1868 (5 Moore's International Arbitration, 4773) limits the claims to those arising from injuries to persons or property * * * which may have been presented to either Government for its interposition with the other since the signature of the treaty of Guadalupe Hidalgo between the United States and the Mexican Republic of the 2d of February, 1848, and which will remain unsettled, as well as any other such claims which may be presented within the time hereafter specified, shall be referred," &c.

These instances might be indefinitely multiplied, but enough have been given to show that where any limitation is made as to the prior presentation of claims, it is expressly specified in the treaty and the jurisdiction of the tribunal over claims is limited only by the terms of the treaty.

* See pp. 75 *et seq.* of this brief.

and contingent liabilities as well for those which had been actually presented prior to the declaration of war.

The provisions of the Act of March 2 1901, creating this Commission, indicate that Congress understood that claims had been assumed by the treaty and would be adjudicated by this Court which had not been presented by the Government of the United States to Spain. As has already been stated, the relinquishment and assumption clauses of the treaty and the jurisdictional clause of the Act are co-extensive each with the other. Had Congress considered that only such claims as had actually been presented through the State Department to the Spanish Government had been assumed, it would undoubtedly have limited the jurisdiction of the Court to such claims. Instead, however, of simply providing that the claims in the Department of State should be transmitted by the Secretary to this Commission, it expressly provided that claims could be filed *de novo* by the claimants for a period of six months after the first session of the Commission and created no limitation in regard thereto based upon prior presentation.*

All the provisions of the Act relating to the condition of the claim, the filing thereof and the limitations as to the presentation, are contained in the extracts from the Act which are quoted in the note, and surely it is not possible to deduce from those few clear-cut sentences any support whatever for the Attorney-General's proposition that the jurisdiction of this Court, the assumption of the claims by the United States or relinquishment thereof as against Spain was in any way limited by the prior presentation thereof.

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* Sec. 9 of Chap. 800, 31 U. S. St. L., p. 977, which is the act appointing this Commission, provides: "that every claim prosecuted before said Commission shall be presented by petition setting forth concisely and without unnecessary repetition the facts upon which said claim is based, together with an itemized schedule setting forth all damages claimed. Said petition shall also state the full name, the residence and the citizenship of the claimant, and the amount of damages sought to be recovered, and shall pray judgment upon the facts and law. It shall be signed by the claimant, or his attorney or legal representative, and be verified by the affidavit of the claimant, his agent, attorney or legal representative. It shall be filed with the Clerk of the Commission, and the prosecution of the claim shall be deemed to have commenced at the date of such filing. All claims shall be filed as aforesaid within six months from the date of the first meeting of the Commission, and every claim not filed within such time shall be forever barred: *Provided*, that the Commission may receive claims presented within six months after the termination of said period if the claimants shall establish to their satisfaction good reasons for not presenting the same earlier."

Section 8 of the Act provides "that all reports, records, proceedings and other documents now on file or of record in the Department of State, or in any other department, or certified copies thereof, relating to any claims prosecuted before the said Commission under this Act, shall be furnished to the Commission upon its order made of its own motion, or at the request of the claimant, or of the attorney representing the United States before said Commission. The first section of the Act provides that "this Court shall have jurisdiction to receive, examine and adjudicate all claims of citizens of the United States against Spain which the United States agreed to adjudicate and settle by the seventh article of the treaty concluded between the United States and Spain on the 10th day of December, 1898. It shall adjudicate said claims according to the merits of the several cases, the principles of equity and of international law."

NINETEENTH.—The protocols and records of the American and Spanish Commissioners negotiating the Treaty of Peace and the correspondence between the State Department and the Spanish Government clearly indicate that the claims of the petitioners were included in the assumption clause of Article VII. and in the adjudication clause of the same article, and that a formal demand for the payment of these claims had been made on Spain prior to the declaration of war.

As stated in the preceding point, counsel for the Government have contended that the *Maine* claims were expressly excluded from the assumption clause of Article VII. of the Treaty and also from the adjudication clause at the end of the same article: they have attempted to sustain this position by referring to the protocols of the Commission and the letter of Secretary Day of July 30, 1898, to the Duc d'Almodovar del Rio: and they also claim that the expressions used in the protocols (which will be hereafter quoted at length) should be construed by this Court as a direct promise to the Spanish Government that there would be no subsequent adjudication between the United States and its own citizens of claims involving the destruction of the *Maine* and its causes. In fact, the closing of the final argument of the Government counsel was an earnest plea on behalf of the Spanish Government that this Court, constituted by the United States Government under the adjudication clause of Article VII. would not violate the good faith of the American nation by attempting to ascertain the rights of American citizens for fear that it might offend and disgrace the Spanish Government.

So far from protocols of the Peace Commission and the correspondence between the Department of State and the Spanish Government, sustaining the position of the Attorney-General, the only reasonable construction that can be placed upon them thereon, is that the United States assumed all claims of its citizens against Spain, and stated to the Spanish Commissioners that the matter **as between the United States and Spain was closed, and that as between itself and its own citizens the United States would adjudicate all claims, to the exclusion of Spain, and in the manner in which it is now adjudicating them,** to wit, by the creation of this Commission: this construction necessarily clothes this Court with jurisdiction to hear and determine these claims; and if it has jurisdiction to consider the claims at all it must have full power to adjudicate them upon the merits, as it cannot be conceived that a Court directed to adjudicate claims upon their "merits and the principles of equity and of international law," could possibly take jurisdiction of any cases and be limited as to the

extent of its investigation by any fear of wounding the sensibilities of a friendly nation.

When the claimants' counsel called attention in his opening argument to that portion of the Government's brief which referred to the inadvisability of this Court investigating this question for fear of offending "the sensibilities of a friendly nation," the President of the Court informed him that it would be unnecessary to continue the argument upon that point, and relying upon that suggestion counsel passed at once from that branch of the subject and he does not intend to discuss it any further in this brief, but he will confine the argument to the effect of the correspondence and protocols referred to by the Attorney-General.

In order to fully appreciate the effect of the "protocols" of the Peace Commission which have been referred to by the Attorney-General, and which will be quoted in full under this point, it is necessary to trace the history of the *Maine* claims from their inception, so far as the relations of the United States and Spain in regard thereto are concerned.

The explosion occurred on February 15, 1898. During the next few days several messages of sympathy were received from the Spanish Government at Madrid, and also from officers of the Spanish Government in Cuba, all of which were properly acknowledged by the Department of State; in none of the messages was there any admission of responsibility for the act, nor in the acknowledgments thereof by the United States was there any expression which might be construed as relieving Spain of any responsibility for the act.

On March 20th, while the Naval Court of Inquiry was holding its sessions, the President, relying upon the fact that the burden of proof rested upon Spain to disprove her responsibility for the destruction of the *Maine*, as he was clearly entitled to do* communicated to Mr. Woodford, through Secretary Sherman, that the Naval Board would make a unanimous report that the *Maine* was blown up by a sub-marine mine, and that the matter could be peacefully settled if full reparation were promptly made.†

Letters, despatches and instructions passed in quick succession‡ between Washington and Madrid, all of which contained imperative

* See authorities collated on this subject under Seventeenth Point, *ante*.

† "*Maine* loss may be peacefully settled if full reparation is promptly made, such as the most civilized nation would offer. But there remain general conditions in Cuba which cannot be longer endured, and which will demand action on our part, unless Spain restores honorable peace which will stop starvation of people and give them opportunity to take care of themselves, and restore commerce now wholly lost. April 15th is none too early date for accomplishment of these purposes. Relations will be much influenced by attitude of Spanish Government in *Maine* matter, but general conditions must not be lost sight of. It is proper that you should know that, unless events otherwise indicate, the President, having exhausted diplomatic agencies to secure peace in Cuba, will lay the whole question before Congress" (U. S. For. Rel., 1898, pp. 692, 693).

‡ On March 22, 1898, Mr. Woodford notified the President that he had seen Minister Moret that morning and had a conversation with him in which he had stated to him that

demands for separation, until at last on March 26th Secretary Sherman telegraphed to Minister Woodford a long summary of the report of the *Maine*, in the last sentences of which he distinctly stated the position of the United States Government as follows:

"Upon the facts as thus disclosed a grave responsibility appears to rest upon the Spanish Government. The Maine, on a peaceful errand, and with the knowledge and consent of that Government, entered the harbor of Habana, relying upon the security and protection of a friendly port. Confessedly she still remained, as to what took place on board, under the jurisdiction of her own Government; yet the control of the harbor remained in the Spanish Government, which, as the sovereign of the place, was bound to render protection to persons and property there, and especially to the public ship and the sailors of a friendly power."*

" beyond and above the destruction of the *Maine*, unless some satisfactory agreement is reached within a very few days, which will assure immediate and honorable peace in Cuba, the President must at once submit the whole question of the relations between the United States and Spain, including the matter of the *Maine*, to the decision of Congress." (U. S. For. Rel., 1898, p. 696.)

On March 25 Mr. Woodford wrote to Mr. Sherman an account of his interview of March 23d in which he repeated the statement which has just been quoted and stated that Minister Gullon had replied that

" the Spanish Government had not received the text of the Spanish report upon the explosion of the *Maine*, and in the absence of any statement by myself [Mr. Woodford] as to the character of the American report he could not discuss the matter, but that the Spanish Government would certainly do whatever right and justice should require when his Government should have full knowledge of all the facts" (U. S. For. Rel., 1898, p. 698.)

After referring to other subjects, Mr. Woodford said that he closed the interview

" by expressing my belief that the present Spanish Government would deal justly and honorably in regard to the destruction of the U. S. S. *Maine*, in the harbor of Havana, whenever I should be instructed to present that matter for diplomatic action, but that now, beyond and above the destruction of the *Maine* and even beyond and above all questions of the destruction of American property interests in Cuba, the great and controlling questions of humanity and civilization require that permanent and immediate peace be established and enforced in the Island of Cuba.

" Minister Gullon replied to me, through Minister Moret as interpreter, that Spain might be relied upon to do what is right and just and honorable in the matter of the *Maine*" (U. S. For. Rel., 1898, pp. 699–700.)

At a subsequent point in the letter, Mr. Woodford said:

" The Spanish Minister was very earnest in his desire that the report of the investigating commission on the subject of the *Maine* should not be sent to Congress, but should be held as a subject of diplomatic adjustment between the two Governments. He assured me that Spain would do in this matter whatever should be just and right." (U. S. For. Rel., 1898, p. 701.)

On March 25, Mr Woodford sent the President a long telegram, the first sentence of which was as follows:

"Official interview this afternoon (Friday) with Minister of Foreign Affairs. He assures me positively that Spain will do all the highest honor and justice require in the matter of the *Maine*." (U. S. For. Rel., 1898, p 703.)

* That part of Secretary Sherman's telegram relating to Spain's responsibility is:

" In conclusion, Court finds that loss of *Maine* was not due to any fault or negligence of any of the officers or crew, but to explosion of a submarine mine, which caused partial explosion of two or more of the forward magazines. No evidence, however, obtained fixing responsibility on any person or persons. * * * (Extract above then follows.)

" The Government of the United States has not failed to receive with due apprecia-

The Spanish Government practically accepted these demands and the United States was informed through the proper diplomatic channels that the matter would be adjusted in some way honorable and favorable to both nations, and that Spain would arbitrate the matter.*

Meanwhile correspondence took place between Senor Polo de Bernabe, the Spanish Minister at Washington, and Mr. Day, enclosing copies of reports both of the Spanish Investigating Committee and the United States Naval Board of Inquiry.† Matters were still in this position when, on April 11th, President McKinley transmitted his message to Congress in regard to the condition of affairs in Cuba, in which he referred to the *Maine* in the language which has already been quoted at some length, pages 26 *et seq.*, *ante*, as well as to the propositions which had been made in regard to arbitration by Spain, and also declared that the destruction of the vessel was a patent and impressive proof of a state

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tion the expressions of sympathy by the Government of the Queen Regent with the United States in the loss of its ship and sailors. This fact can only increase its regret that the circumstances of the case, as disclosed by the report of the board of inquiry, are such as to require of the Spanish Government such action as is due where the sovereign rights of one friendly nation have been assailed within the jurisdiction of another. The President does not permit himself to doubt that the sense of justice of the Spanish nation will dictate a course of action suggested by the friendly relations of the two Governments. You will communicate the contents of this instruction to the Minister of State and give him paraphrase if desired " (U. S. For. Rel., 1898, pp. 1041, 1042).

* On March 28th Minister Woodford, at an interview with the Spanish Minister of Foreign Affairs, communicated Secretary Sherman's views to him leaving a statement couched in exactly the same words as contained in the dispatch, and on March 28th so informed the Secretary of State (U. S. For. Rel., 1898, pp. 1040–1044). On March 29th he addressed a letter to the President in which he stated that he had read the summary just referred to and left an official note giving such summary with the Minister of Foreign Affairs, and that on the following day he had had an interview with President Sagasta and Senor Moret and Senor Gullon, and that after stating the position of this Government he had awited President Sagasta's reply who had

" mentioned the loss of the *Maine*, and expressed his appreciation of the manner in which you [the President] had presented the subject to Congress, and added that he believed your method of dealing with this question would enable the two Governments to examine and adjust the matter in some way honorable and fair to both nations " (U. S. For Rel., 1898, p. 719).

Another account of this interview, in which the same is repeated, was transmitted by Mr. Woodford to Mr. Day (U. S. For. Rel., 1898, p. 723).

Meanwhile, on March 28th, President McKinley transmitted to Congress the official report of the Maine Board of Inquiry. He closed his message by referring to the fact that he had communicated the contents of the report and the views of this Government in regard thereto to the Queen Regent.

On April 1st Mr. Woodford wrote to the President stating that the propositions made by the Spanish Government in regard to affairs in Cuba went as far as they could possibly go, but he said they had already yielded one or two points, including one as follows:

" First, they are willing to arbitrate the *Maine* matter. Some days ago they talked fight if we should even suggest that they were responsible for the loss of the *Maine* " (U. S. For. Rel., 1898, p. 728).

† U. S. For. Rel., 1898, pp. 1045 *et seq.*

of things in Cuba that was intolerable and such that the Spanish Government "cannot assure safety and security to a vessel of the American navy in the harbor of Havana on an errand of peace, and rightfully there."* The message was referred to the Committee on Foreign Relations of the United States Senate, which had already other matters relating to the explosion of the *Maine* before it, in regard to which it had taken considerable testimony. In fact, the Senate through this committee, conducted an independent investigation into the causes of the destruction of the *Maine*, and the resolutions which were reported by it on April 13th and subsequently adopted on April 20th† were not based exclusively on the report of the Naval Court as transmitted by the President, but also upon competent testimony taken by the committee, and its findings‡ are entitled to the greatest weight and consideration.

The report of the Committee was published, printed and widely distributed, and while there is no evidence that the entire report was formally transmitted to the Spanish Government, there was no injunction of secrecy placed thereon, and it is now a matter of history that the report was published far and wide in the public press, both American and foreign, and was accessible to every person who desired to obtain a copy thereof, and the presumption must be, therefore, that the Spanish Government was fully aware of the report and everything that was contained therein. All other documents referred to under this point were directly transmitted to the Spanish Government or proceeded therefrom.

On April 20th the resolutions recommended in the report were adopted and were transmitted to the Spanish Government, which regarded the passage thereof as an act of hostility, and not only refused to comply therewith, but severed diplomatic relations in a manner which Mr. McKinley declared in a message transmitted on April 25, 1898, to Congress "accompanies an existing state of war between sovereign powers."

This was immediately followed by the Act of April 25, 1898, declaring war to have existed against the Kingdom of Spain since April 21, 1898.§

The foregoing recital of facts contains, as counsel believes, all the published correspondence and public enactments, and of which this Court will take judicial knowledge, relating to the destruction of the battleship *Maine* so far as diplomatic relations between this country and Spain are concerned prior to the declaration of war. It shows that at

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* U. S. For. Rel., 1898, p. 758.

† These resolutions appear in full on p. 29, *ante*, of this brief.

‡ "It is the opinion of your committee, having considered the testimony submitted to the board of inquiry, in connection with further testimony taken by the committee, and with the relevant and established facts presented by the events of the last three years, that the destruction of the *Maine* was compassed either by the official act of the Spanish authorities or was made possible by a negligence on their part so willing and gross as to be equivalent in culpability to positive criminal action" (Sen. Rep. No. 885, 55th Congress, 2d Session, p. v.).

§ 30 U. S. Stat. at L., p. 36, and see act quoted in full p. 30, *ante*, of this brief.

the commencement of the war the Government of the United States had formally, both by executive and legislative action, declared that Spain had not "assured safety to a vessel of the American Navy in the harbor of Havana while on a mission of peace and rightfully there;" that the destruction of the vessel was "compassed either by the official act of the Spanish authorities or was made possible by negligence on their part so willing and gross as to be equivalent in culpability to positive criminal action," and that through the regular diplomatic channels of the Department of State and our Minister to Spain the United States had formally expressed to the Spanish Government a demand, couched in regular diplomatic language, that such proper reparation should be made as was due from one civilized nation to another under the circumstances. The claimants therefore contend that at the commencement of war, and at the time of the peace negotiations in Paris, all the formalities necessary to transform any abstract right which they might have had to request the Government of the United States to obtain indemnity for them from the Spanish Government had been transformed by executive and legislative action into a recognition of their claims and a formal demand upon Spain to make adequate reparation therefor.

From April 21st until July 30th, during the period of active hostilities between Spain and the United States, no diplomatic relations existed between the two countries, and there was therefore no further correspondence in regard to these claims and the status was exactly the same on July 30th as it was on April 20th, 1898.

When Spain, thoroughly realizing the hopelessness of the contest, requested a cessation of hostilities, and instituted negotiations of peace, the Duc d'Almodovar del Rio, on behalf of the Queen Regent, and through the French Ambassador, made the first advances in July, 1898, Mr. Day responded on July 30th, 1898, in a letter setting forth the terms upon which the President of the United States was willing to make peace with Spain, and in which, without making specific reference to the claim of any citizen or of any classes of claims of citizens of the United States, he declared that claims of our citizens for injuries to their persons and property during the late insurrection in Cuba must be provided for by the cession of Porto Rico and other territory.* The expression used was broad enough to cover every claim which the United States might have put forward at that time against the Government of Spain, and if Secretary Day had appended to

* "The President, desirous of exhibiting signal generosity, will not now put forth any demand for pecuniary indemnity. Nevertheless, he cannot be insensible to the losses and expenses of the United States incident to the war, or to the claims of our citizens for injuries to their persons and property during the late insurrection in Cuba. He must therefore require the cession to the United States, and the evacuation by Spain of the islands of Porto Rico and other islands now under the sovereignty of Spain in the West Indies, and also the cession of an island in the Ladrones to be selected by the United States" (U. S. For. Rel., 1898, 821).

the letter a schedule of the claims which he intended to cover by his general expression, it would not only have been eminently proper for him to have included the claims of the petitioners arising from the destruction of the *Maine* therein, but it would have been eminently improper for him to have excluded them therefrom; there is nothing whatever in the language used which justifies the statement made by the counsel who so ably closed the case on behalf of the Government that the evident intent of Secretary Day's letter was to positively exclude the claims arising from the destruction of the *Maine*.

Nothing further appears to have been said about the *Maine*, or any other claims until after the peace protocol had been signed, and the Commissioners were negotiating the treaty of peace in Paris, when a correspondence took place between Mr. Day and Mr. Rios, one of the Spanish Commissioners, in which Mr. Day assured him that all claims, National and individual, were relinquished, and that citizens of the United States would look to their own Government for indemnity for the claims relinquished by the treaty.*

On December 5th, 1898, at a meeting of the Commissioners, the articles of the treaty from I. to VIII. were read and agreed upon, subject

* M. Rios, on November 22d, addressed a letter to Mr. Day, who was then President of the American Commission, in which he said:

"The Secretary of State having stated in his note of July 30th last, that the cession by Spain of the Island of Porto Rico and the other islands now under Spanish sovereignty in the West Indies, as well as one of the Ladrones, was to be as compensation for the losses and expenses of the United States during the war, and of the damages suffered by their citizens during the last insurrection in Cuba, what claims does the proposition refer to as requiring that there shall be inserted in the treaty a provision for the mutual relinquishment of all claims, individual and national, that have arisen from the beginning of the last insurrection in Cuba to the conclusion of the treaty of peace?" (Message of President transmitting treaty of peace to Senate, Sen. Doc., 55th Cong., 3 Sess., No. 62, Part 1, January 4, 1899, p. 217).

On the following day Mr. Day replied, and after restating M. Rios' question, said:

"While the idea doubtless was conveyed in the note of the Secretary of State of the United States of the 30th of July last, that the cession of 'Porto Rico and other islands now under the sovereignty of Spain in the West Indies, and also the cession of an island in the Ladrones, to be selected by the United States' was required on grounds of indemnity and that, 'on similar grounds the United States is entitled to occupy and will hold the city, bay, and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines,' no definition has as yet been given of the extent or precise effect of the cessions in that regard. The American Commissioners therefore propose, in connection with the cessions of territory, 'the mutual relinquishment of all the claims for indemnity, national and individual, of every kind, of the United States against Spain and of Spain against the United States, that may have arisen since the beginning of the late insurrection in Cuba and prior to the conclusion of a treaty of peace.'

"And I may add that this offer is made by the American Commissioners in full view of the fact that the citizens of the United States, having claims that come within the foregoing relinquishment, will, on the strength thereof, apply to their own Government for indemnity." (Doc., No. 62, cited *supra*, 219.)

to modifications as to form, upon which the Secretaries were to agree.* The then language of this article was practically the same as the first clause of the article which was finally adopted and incorporated into the treaty as concluded and ratified, the second clause as to adjudication of claims by the United States of the article as it now is included in the treaty was not included in the first draft. On December 6th, as appears by protocol No. 20 of the Peace Commissioners, articles were presented by the American and Spanish Commissions each to the other, but it is evident from the final adoption of the first eight articles on the previous day that these were, as stated in the protocol of that day† "*Additional Articles*," and were not intended in any way to supersede the article already adopted, by which both Governments had mutually relinquished all claims against the other.

The article which the Spanish Commissioners wished to have inserted in the treaty of peace in regard to the *Maine* provided for the appointment of an international commission, consisting of seven experts "to be entrusted with investigating the causes of and responsibility for the *Maine* catastrophe" and which, after prescribing the method of appointment of the Commissioners and that each Government should pay one-half of the expenses, provided that: "In the event of the Spanish Government being found responsible, it shall pay to the United States its share of the expenses of the Commission. Further, a Spanish war ship must go to New York and salute the flag of the United States."‡

It also appears by protocol No. 20 that this article was rejected by the American Commissioners, who stated that they considered the case as closed; but the President of the Spanish Commission stated that he

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* "The reading in English and Spanish of the articles of the treaty from the first to eighth, inclusive, was then proceeded with, and they were approved by both Commissions, which declared them to be final save as to mere modifications of form, upon which the Secretaries-General might endeavor to agree." (Sen. Doc. No. 62, p. 230.)

The article containing the relinquishment of claims, which was then numbered VI. but afterwards became No. VII. by a re-arrangement of articles included in those read, was as follows:

"ARTICLE VI.—The United States and Spain, in consideration of the provisions of this treaty, hereby mutually relinquish all claims of indemnity, national and individual, of every kind (including all claims for indemnity for the cost of the war), of either Government or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the ratification of the present treaty." (Sen. Doc. No. 62, p. 234.)

† Sen. Doc. 62, p. 242.

‡ The proposed "Additional Article" then provided that:

"If, on the contrary, the Commission shall decide that Spain is not responsible, attributing the catastrophe to an accident inside the vessel or other fortuitous cause, the Government of the United States shall pay to Spain its share of the expenses of the Commission. Moreover, the President of the United States shall report the arbitral award to the Congress of the United States, setting forth in the official message the righteous course of the Spanish nation." (Sen. Doc. No. 62, 243.)

was unable to consider it as closed since the President of the United States had referred to it in his message to Congress on the previous Monday, to which the President of the American Commission replied that they had not received a copy of the message and therefore had not read it, to which the President of the Spanish Commission replied that he had in his possession an extract from it which he could produce, but the American President answered that the American Commissioners did not care to continue discussion of the subject on the present occasion. This closed the incident for the day, and other additional articles were then proposed by the Spanish Government, some of which were rejected and some of which were accepted.* On December 8th, the meeting of December 7th having been postponed to that date, the protocol of the preceding session was read and approved, and the Spanish Commissioners then observed† that although the American Commissioners had rejected the article presented by them relating to the *Maine*, they considered it their duty to insist upon this question being submitted to arbitration. The American Commissioners answered referring to the observations made by them on this subject of the last session.‡

* Sen. Doc. No. 62, pp. 243, 244.

† Sen. Doc. No. 62, p. 250.

‡ To this the Spanish Commissioners, who seemed unable to understand the situation, and under the impression that by constant insisting they might obtain some concession, replied that since

"this new proposal for arbitration was also rejected they would ask the American Commissioners to be pleased to propose some method of clearing up the matter of the *Maine*, and the responsibility growing out of it, so that the unjust prejudice against Spain shown in the United States by reason of an incomplete investigation might disappear, and the resentment of Spain because the uprightness of her authorities or subjects, and the capacity of her administration to guarantee the safety in her ports of vessels of a nation with which she was at peace, had been placed in doubt, might also be blotted out."

The American Commissioners replied to this that they had no method to propose (Sen. Doc. No. 62, p. 251), and this is all that transpired verbally between the Commissioners upon that day as appears in protocol No. 21, but as an annex to the protocol a memorandum of the Spanish Commissioners was submitted in which the Commissioners explained as the reason why they had insisted upon the arbitration the fact that the President had in his message of December 5th referred to the explosion of the *Maine* as *suspicious*, and the memorandum ended with the following remarkable statement:

"The Spanish Commission, therefore, cannot yield to such a refusal, and solemnly records its protest against it, setting forth that in the future it shall never be lawful for those who oppose the investigating of the cause of that horrible disaster, to impute, openly or covertly, responsibility of any kind therefor to the noble Spanish nation, or its authorities" (Sen. Doc. No. 62, p. 260.)

On the following day after an exchange of courtesies, the treaty was prepared and signed, and Mr. J. B. Moore, Secretary of the Commission, transmitted a reply to the memorandum of the Spanish Commissioners just referred to, in which he said:

"Respecting the observation in the memorandum of the Spanish Commission upon the last message of the President of the United States, wherein he refers to the disaster to the battleship *Maine*, the American Commissioners feel obliged to decline to enter upon

Meanwhile it appears that the treaty had been redrafted by the Secretaries, that the article in regard to the relinquishment of claims had been revised so as to read as finally adopted,* including the final clause as to the adjudication by the United States of the claims relinquished.

The only possible conclusion which can be drawn from the correspondence between the American and Spanish Commissioners and the protocols of their conversations in regard to the *Maine* disaster is that Spain requested an international adjudication of the causes of the destruction, and the United States refused the request; and as the Spanish Commissioners, in their memorandum, attempted to say that there could be no imputation as to her fault in the absence of such arbitration, the United States Commissioners inserted in the treaty an additional clause to the effect that the United States would itself *adjudicate*, as well as *settle*, the claims of its citizens which had been relinquished in order that there might be no question as to the right of the United States to settle with its citizens in such manner as it should see fit, even if it required an adjudication which would necessitate an investigation of every cause connected with the claims. This contention is borne out by the statement of Mr. Moore, referring to the well-established precedents and practice in the history of our country. Mr. Moore undoubtedly had in mind the Mexican case in which we made peace with Mexico and then assumed and settled all of the claims owing to American citizens and in regard to which there was no limitation as to the method of investigating the cause: to the distribution of the Alabama award in which we received from Great Britain $15,500,000 as a lump sum, and distributed the same pursuant to the awards made by the Court of Alabama Claims: to the treaty with Spain in 1819, by which we acquired Florida and released Spain from the claims due to our citizens, and thereupon adjudicated the claims without any limitation upon the power regardless of how they might have arisen.

With the signature of the treaty by the Commissioners of both Spain and the United States, the negotiations were concluded and were merged into the treaty itself, and the claimants contend that the words of the treaty as they stand in Article VII, providing for a mutual relinquishment of all claims by both Governments, national and individual, against the other, and for the adjudication by the United States of the claims relinquished by its citizens, are so clear that they cannot be changed by any interpretation, and that in the absence of any am-

any discussion of the same, in obedience to well established precedents and practice in the history of their country" (Sen. Doc. No. 62, p. 262).

* "Article 7. The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

"The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article" (Sen. Doc. No. 62, pp. 266, 267).

bigunity it is unnecessary, and therefore not allowable, to resort to the protocols of the Peace Commission or to the correspondence relating thereto in order to obtain any different construction than that which appears upon the face of the article. The elementary rule of law, that all prior negotiations and correspondence are necessarily merged into the instrument itself, is as applicable to treaties between nations as it is to contracts between individuals, and, therefore, the protocols upon which the Attorney-General spent so much time cannot in any way affect the construction of the clause by which all the claims were relinquished against Spain by the United States and assumed by that Government as to its citizens. The complete record from the 15th day of February to the 10th day of December, 1898, has been rehearsed under this point in order that this Court might have before it, in a condensed and consecutive form, everything which related to these claims from the time that they first arose until the time that they were finally extinguished as against Spain and assumed by the United States.

It is not proper, however, to close this point without referring to the argument of the counsel closing the case for the Government on the oral argument, especially in regard to his proposition that the protocols of December 5th—December 10th of the Peace Commission in Paris are to be construed practically into a solemn contract between the United States and Spain, that from that time the incident should be closed not only as against the Spanish Government but also between the United States and its own citizens in regard to the adjudication of these claims.*

His earnest appeal to this Court not to further wound the sensibilities of a friendly nation and not to disgrace a once powerful but now unfortunate nation, might indeed have been effective before an international tribunal had he been representing the Spanish Government and the United States was presenting these claims; inasmuch as his argument was to the effect that the absolute rights of American citizens under a treaty made on their behalf by their own Government should be subordinated to the "sensibilities" of a foreign power, counsel does not consider that it requires any refutation beyond its mere statement.

If the treaty of 1898 is to be construed in connection with correspondence and protocols, this Court must presume that the American Commissioners were regarding not the "sensibilities" of the Spanish Government on points of honor, but the actual vested rights and property of American citizens. On the present occasion no interests of Spain are at stake and therefore the presumptions need not be construed as against a victorious power insisting upon terms in a treaty of peace, but in favor of those citizens who were not present and whose Government

* The word "protocol" as used in treaty negotiations does not mean agreement, as it sometimes does when the foreign offices of different governments finally dispose of a diplomatic matter, but simply minutes of a meeting. For this sense, see U. S. For. Rel., 1871, under Great Britain, and proceedings of Commissioners negotiating the Treaty of Washington of 1871.

sacrificed their claims for its own purposes with full knowledge, as was expressed by Secretary Day, that they would look to their Government for the adjudication and payment of the claims which were thus sacrificed for the sake of peace and in order that no further punishment need to be meted out to the nation which had caused these great injuries to American citizens and against whom the claims not only existed but had actually been presented by this Government.

TWENTIETH.—This is a domestic tribunal. Spain is not before the Court, and in considering Article VII. only the rights of American citizens can be considered.

The closing of the argument of the Government contains a plea for Spain and an effort is made to induce this Court to consider itself under some obligation to the Spanish Government not to adjudicate the *Maine* claims by reason of an implied promise made by the American Commissioners to the effect that the incident was closed and would never be reopened.

In the last point that matter was discussed and the correspondence and protocols were quoted from at length to show that no such construction could possibly be placed upon the treaty or the correspondence in regard thereto or the protocols of the Commissioners in Paris. The counsel for the Government have argued this case as though Spain had some interest in the amount involved which is to be paid to American citizens. They have made arguments similar to those which might have been made had the treaty contained a provision that in case the amounts assumed by the Government of the United States upon adjudication amounted to over a specified sum, Spain should pay all of such excess and that they were bound on behalf of Spain to keep the amount below the specified figure.

Had Spain remained liable in whole or in part it might be proper at the present time for that Government to be represented before this Commission and to protest against the allowance of claims which had been excluded from the relinquishment or the assumption clause. No such condition exists, however, and it is absolutely immaterial to Spain whether the United States, in adjudicating and settling these claims, shall be obliged to pay five million dollars or fifty million dollars. Spain has been forever released and the United States alone has undertaken to adjudicate and settle the claims. Citizens of the United States are the only parties, and therefore the rules of the construction of this treaty must be exactly as though the United States and its citizens were the only parties to the treaty. In fact, the final clause of Article VII. of the treaty is practically a contract or treaty between these claimants and

the United States, and under these circumstances it must be construed liberally for the claimants and strictly against the United States.

If the argument of the counsel for the Government is correct and Spain has an interest in the amount paid these claimants, the argument might just as well be carried to a further point, and at some subsequent period Spain can come in and declare that the claims had been stated as amounting to many more millions of dollars than the Government has finally paid upon the judgments of this Court, and demand the difference between that total and the minimum to which the Attorney-General hopes to reduce these awards on the ground of false representations, and that it parted with Porto Rico and its other possessions, supposing that anywhere from $16,000,000 to $60,000,000 was to be paid by the United States to its citizens.

It is a well settled rule in the construction of treaties that clauses of this nature must be construed strictly against the party making them.* The United States needed these claims in order to make peace. It took them by the right of eminent domain, confiscated them and not only rendered them valueless as against Spain, but took it forever out of the power of the United States to present them against Spain at any future time, and therefore in the construction of this clause every presumption must be taken against the United States and in favor of every person who had a claim or an abstract right of any kind to demand indemnity for any loss which he had sustained.

Again, if the argument of the Government's counsel is correct, the Commissioners at Paris pledged to Spain the solemn faith of the United States that the explosion of the *Maine* would never be even referred to again by any official of the United States in any manner derogatory to Spain.

It must be admitted that the requests of the Spanish Government to arbitrate the matter had nothing whatever to do with the financial side of the case, but were only for the purpose of protecting the good name of Spain, and they were called forth, as stated in the protocols, by the allusion of President McKinley in his annual message of December 5th, 1898, to the destruction of the *Maine* as being suspicious.

They asked that the matter be arbitrated because the good name of Spain had been attacked and she had been charged with inability to protect a foreign warship. That was the sole ground of the request on both occasions upon which it was made, and on both occasions the American Commissioners declined to open the subject, because they said the incident was closed. As stated during the argument of the demurrers by the President of this Court the Spanish never used the words attributed to them by counsel for the Government, that the *matter was settled.*

Counsel for the Government cannot confine their arguments to the

* The cases cited under the Thirteenth Point, page 44, *ante*, of this brief as to strict construction of tariff laws against the United States are also applicable to this point.

financial elements of the question; if their contention is sustained it will practically be an adjudication by this Court that if on any occasion hereafter the President of the United States or any other person high in authority shall declare that the destruction of the *Maine* was due to Spanish wrongdoing or Spanish negligence, there will have been a breach of the treaty, for which Spain could justly demand indemnity.

TWENTY-FIRST.—The United States has received compensation for these claims and holds it in trust for these claimants. The Government which receives lands as indemnity for national and individual claims is in the same position towards its citizens whose claims have been relinquished as though the indemnity had been paid in cash.

Counsel for the Government intimated in their argument that these claims had never been heard of until after the treaty had been made and ratified and this Court had been created. In this they are mistaken. As early as February 28, 1898, counsel for the claimants, when there was no thought whatever of representing them before this Commission, stated in the public press that the United States had a right to demand indemnity for all those who had sustained loss by the explosion of the *Maine*.* Be that as it may, however, the United States, as appears by the letter of Secretary Day, which has already been quoted from at length†, and the protocols of the Peace Commission, demanded and received the Island of Porto Rico, the other islands of the West Indies under Spanish sovereignty and the Island of Guam as indemnity not only for war expenses but also for injuries of its citizens to persons and property during the period specified in the Treaty of Peace. Leaving the Philippine archipelago entirely out of the question, the United States to-day owns and exercises sovereignty over a large extent of most valuable territory, which it acquired to some extent by the confiscation and surrender of the claims of its citizens against Spain, and it does not lie in the mouth of the counsel representing the Government to now deny the existence of the claims which were used in part payment for this property.

The value of the property has nothing whatever to do with the matter; when a government accepts territory for national and individual claims it must itself take the risk of the value of the indemnity accepted

* See N. Y. *World* for February 28, 1898.

† See extracts from letter of Secretary Day to Duke d'Almodovar del Rio, of July 30, 1898, referred to on page 78, *ante*, of this brief.

and must pay the claims of the citizens, which its own constitution forbids it to take without just compensation, before it can realize its own national demands. Whether or not the value of the territory acquired by the United States exceeds the amount of the individual claims sufficiently to completely indemnify this Government for the cost of the war is a matter for which the Commissioners at Paris making the treaty, the President approving it, and the Senate ratifying it, are responsible; and if they believe that the territory acquired was sufficient to indemnify the Government, or was all that could be obtained, responsibility falls upon them, and the individual claimants cannot in any way be affected thereby. This is not the first time that the United States has accepted territory as indemnity and paid the claims of the citizens. In the cases of Louisiana ceded by France, and Texas and California ceded by Mexico, there were monetary considerations in regard to the claims which were surrendered at the time; but in the case of Florida the land was taken and claims to the amount of $5,000,000 were assumed and paid, and the counsel for the Government himself admitted that there was a fund in this case. In fact, he declared that Spain was paying the claims and not the United States.*

TWENTY-SECOND. — Governmental obligation for personal injuries to, or deaths of, citizens of other countries recognized under international law as individual claims.

It seems hardly necessary to refer to this point, but in view of certain questions asked on the argument counsel calls the attention of the Court to the numerous cases in Moore's Arbitration in which indemnity for personal injuries to, or deaths of, its citizens in foreign lands has been demanded by the Government of the United States from the government of the country in which the injuries and deaths occurred; and also in which the United States has paid indemnity to foreign governments

* Mr. Russell, in the course of his argument, said (p. 32): "I presume the precedents referred to are the numerous treaties in which the form of the treaty is that of a relinquishment; but the reality of the treaty is that the foreign nation turns over a fund in payment of and by way of donation for political reasons on account of the claims asserted and made by our Government. I am not raising any objection to the proposition that Spain paid over a fund. I am very glad it has been brought forward.

Mr. MAURY: The difference between this and other cases is that we agreed to pay a certain amount—there was a maximun, $3,000,000, I think.

Mr. RUSSELL: It is Spain that is paying the claims provided for in Article VII, and not the United States—paying them out of a fund provided in the treaty, just as if it was a fund of money originally. This land is to be regarded as money, and so much of it is to be paid as the claims are really worth and not a maximum to be distributed upon some loose principles of international comity."

under similar circumstances. Wrongful governmental acts and negligence to prevent mob violence have generally been placed upon the same footing. The Senate Committee on Foreign Relations so placed the cause of the *Maine's* destruction.*

Whether the destruction of the *Maine* was the result of criminal negligence on the part of the Spanish Government in not preventing it, or of actual wrongful governmental act, is immaterial at the present time, as the petitions allege that the destruction of the vessel resulted from one cause or the other, and for a cause for which that Government was responsible. The Government of the United States has necessarily admitted this by demurring, in fact, it has gone further by affirmatively alleging that the act was a cause of the war.

This Court is to adjudicate the claims before it on the principles of equity and of international law. The rules of the common law and of statute law as administered by our municipal courts do not apply or bind this Court. Claims for death and injuries can never exist between governments under any statute, for no power exists to enact the statute. They can be recognized by this Court under the principles of international law;† because the cession of Porto Rico was demanded as indemnity for injuries of our citizens to **person** and property;‡ and because equity demands that when the United States agreed to adjudicate and settle claims of citizens relinquished, it thereby agreed to give to its citizens all that it already had or could have demanded from Spain in their behalf.§

One specific instance will be cited as the basis for the claims of petitioners who are relatives of those who were killed.

The claims of the families of the passengers and crew of the *Virginius*, who were shot in Cuba in 1873, were settled by the payment of a lump sum of $80,000 by Spain.‖

The agreement provided that the purpose of the payment was the relief of the families or persons of the ship's company and passengers, and the money was accepted by the United States Government in satisfaction of reclamations of any sort, which, in the sense of personal indemnification, might be advanced against the Spanish Government. It also provided: "The President of the United States will proceed to distribute the same among the families, or the parties interested, in the form and manner which he may judge most equitable, without being obliged to give account of this distribution to the Spanish Government."

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* See extract from Report of April 13, 1898, quoted under Seventh Point, p. 27 of this brief.

† See cases cited under Fifth Point, pp. 21, 22, *ante*.

‡ See Secretary Day's letter of July 30, 1898, cited on p. 80, *ante*.

§ See Senate Report and claims of this nature referred to therein, cited on pp. 27, 28, *ante*.

‖ Protocol or Agreement of February 27, 1875, U. S. For. Rel., 1875, under Spain; see sub-head *Virginius*.

Subsequently the money was received and distributed by President Grant. The money appropriated to the families was divided according to a system which was adopted as being the most equitable, and if the Court will examine the sixty petitions and upwards filed by the firm of the counsel for these claimants it will find that the same basis of distribution which was adopted by President Grant has been adopted as the basis of the demands in these cases.*

TWENTY-THIRD.—The Statute of March 30, 1898, is not a bar to the petitioners' claims; furthermore, payments thereunder cannot be set up on a motion to dismiss for want of jurisdiction or by demurrer.

The act of March 30, 1898, was not for indemnity for death or injury. It was to reimburse for articles lost. The amount was one year's sea pay. The payments had to be made pursuant to provisions of the act and there is nothing on the record of these proceedings to show that these petitioners ever received any money under the act or accepted its provisions.

The United States was not responsible for the destruction of the vessel and the payment was a mere gratuity.

The claims against Spain were actual property rights, and if the United States had attempted to confiscate or condemn them by a nominal payment in this manner the act would have been unconstitutional.

The claim against Spain was necessarily unaffected, as the act was passed March 30, and the treaty was not made and the debt assumed by the United States until December 10, 1898.

During the *reconcentrado* period in Cuba many Americans were assisted by the United States Consul. Some of these persons have claims against Spain for their ill treatment. Is this Court to decide that the help extended in that manner wiped out claims against Spain which were assumed a year later?

As stated under a previous point, Congress appropriated $10,000 for

* "III.—The several amounts allowed as above are to be paid to the widow, children parents, or brothers and sisters of the deceased as follows:

(1) To the widow of the deceased.

(2) If no widow, to the children of the deceased in equal shares. Where such children shall be minors, the same shall be paid to a legally appointed guardian.

(3) If no children, then to the father; if no father, to the mother.

(4) If no father or mother, then to the brothers and sisters in equal shares.

(5) If the deceased shall have left no widow, child, parent, brother or sister, no amount is to be paid on his account."

49th Cong., 2nd Sess., Sen. Ex. Doc. No. 82. Mess. of President Cleveland on distribution *Virginius* fund, Feby. 14, 1887.

the crew of the *General Armstrong*, but that did not interfere with pressing claims of the same persons against Portugal for the damages caused by its violations of neutrality in the Harbor of Fayal. The effect of this statute has been covered so thoroughly in the able argument of other counsel, that it will not be enlarged on here.

Had the claims against Spain been referred to an international tribunal, Spain would not have been able to plead this statute and payments under it, if any were made; and, as the United States stands in the shoes of Spain before this tribunal, it cannot plead anything as a defense which would not have been pleadable by Spain.

TWENTY-FOURTH.—A moral obligation rests upon the United States and upon this Court to adjudicate these claims for the petitioners.

This Court will take into consideration the great disadvantage under which the petitioners have been placed by the obliteration of their claims against the Spanish Government and the assumption thereof by the United States under the treaty of 1898.

Doubtless the United States had the constitutional right to relieve Spain from all obligation for the wrongs committed by that country upon American citizens, arising from the abhorrent condition of the island of Cuba, and culminating in the destruction of the *Maine* and the death of two hundred and sixty-six American seamen, and to assume, adjudicate and settle these claims itself; but although this right existed, availing of it has necessarily placed all of the claimants under the disadvantage of having the Government of the United States arrayed against them instead of being upon their side. Had the Treaty of Peace provided that Spain should remain liable for all claims owing by that Government to citizens of the United States, and provided for a regular international tribunal to adjudicate such claims, every suitor before this Court would have been represented before such tribunal by the Government of the United States, which would have used its tremendous power to procure for each claimant not only a favorable adjudication on every point of law involved, thus extending the liability as far as possible from a legal standpoint, but it also would have urged such tribunal to render as large an award as possible from a pecuniary standpoint.

Since, however, the United States has released Spain from all liability, and agreed not only to adjudicate these claims, but also to assume the payment thereof, the claimants now find that they have not only lost the weight and influence of their own Government in urging these claims to the widest extent and for the fullest amount, but they find that Government appearing against them before this tribunal, with

an array of able counsel especially employed not only to limit the liability of Spain to the narrowest point, and reduce the loss for which citizens of this country are entitled to indemnity to the smallest amount, but, as appears by these demurrers, to obtain from this Court, created by Congress for the purpose of adjudicating and settling these claims, a legal decision that the claims do not even exist.

This Commission must, as it undoubtedly will, always bear in mind that in adjudicating these claims it is laying down the law for the future: it must remember that some day decisions which this Court shall make determining the extent of the liability of the United States as the assuming debtor for crimes committed by the Spanish Government upon American citizens, will be cited against the United States as the measure of liability which can be asserted by that Government itself as resting upon foreign nations under similar circumstances.

A grave responsibility rests not only upon the Spanish Treaty Claims Commission as a Court, but also upon the Attorney-General, for the position taken by him on behalf of the Executive Department of this Government. His arguments and briefs will undoubtedly some day be quoted before The Hague, and other international, tribunals as declaratory of the full measure of liability which, in the opinion of the present executive department of this Government, rests upon a foreign government for the ill-treatment of American citizens: such liability cannot be any greater when the foreign country itself has to pay the damages sustained by our citizens than when the United States is obliged to pay them by virtue of an assumption similar to that of the treaty of 1898.

The foregoing remarks relate particularly to the questions of international law to be determined by this tribunal and not to the amounts of damages to be assessed by it. It is eminently proper that this Court should closely scrutinize every claim presented to it so far as the *amount* claimed for damages is concerned. Possibly some of the claims for damages to property which it will be called upon to adjudicate may have been estimated by the sufferers at amounts which will bear inspection, and a sum less than that claimed would reimburse the claimants for the damages sustained. So far as the facts are concerned, this Court should require the fullest proof which can be obtained that the injuries actually were received and the loss actually was sustained, but as to the principles of equity and of international law involved, let this Court remember that the protection which must be accorded to citizens of the United States in foreign lands must be so full and complete that plantations belonging to American citizens cannot be burnt and pillaged, that American citizens cannot be ruthlessly shot or imprisoned regardless of the forms of law and the protection afforded by international law and by treaty stipulations, and that above all our soldiers and sailors cannot be hurled into eternity from the deck of a battleship in a so-called friendly country's harbor while on a mission of peace and rightfully there.

TWENTY-FIFTH.—The demurrers should be overruled and the claimants awarded the amount of their damages, as alleged in the petitions.

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